

***United States Court of Appeals
for the Second Circuit***



APPENDIX

VOLUME TWO

77-2057

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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DAVID HOLLIS,

Petitioner-Appellant,

- against -

HAROLD J. SMITH, Superintendent, Attica
Correctional Facility,

Respondent
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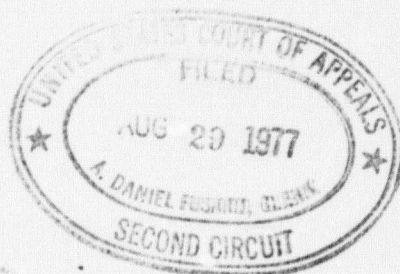
On Appeal from the United States District
Court for the Eastern District of New York

APPENDIX FOR PETITIONER-APPELLANT

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TABLE OF CONTENTS

VOLUME ONE

OPINION AND ORDER DENYING PETITION	A-1
MEMORANDUM AND ORDER GRANTING RECONSIDERATION, ADHERING TO ORIGINAL DECISION AND DENYING CERTIFICATE TO PROBABLE CAUSE	A-9
ORDER GRANTING CERTIFICATE OF PROBABLE CAUSE	A-14
PETITION FOR A WRIT OF HABEAS CORPUS	A-15
NASSAU COUNTY INDICTMENT NO. 20287	A-27
MINUTES OF CHANGE OF PLEA IN NASSAU COUNTY COURT	A-29
MINUTES OF PSYCHIATRIC HEARING IN NASSAU COUNTY COURT	A-37

VOLUME TWO

MINUTES OF PSYCHIATRIC HEARING (continued)	A-109
PSYCHIATRIC REPORT SUBMITTED TO THE NASSAU COUNTY COURT	A-142
DECISION AND ORDER OF NASSAU COUNTY COURT AFTER PSYCHIATRIC HEARING	A-144
MINUTES OF SENTENCE IN NASSAU COUNTY COURT	A-146
LETTER FROM RESPONDENT'S COUNSEL TO JUDGE PLATT	A-149
EXCERPT FROM DEFENDANT'S APPELLATE DIVISION BRIEF IN PEOPLE V. DAVID HOLLIS	A-150
EXCERPT FROM DISTRICT ATTORNEY'S APPELLATE DIVISION BRIEF IN PEOPLE V. DAVID HOLLIS	A-164
EXCERPT FROM DEFENDANT'S APPELLATE DIVISION BRIEF IN PEOPLE V. HOWARD McCRAW	A-169
EXCERPT FROM DISTRICT ATTORNEY'S APPELLATE DIVISION BRIEF IN PEOPLE V. HOWARD McCRAW	A-188
EXCERPT FROM RESPONDENT'S MEMORANDUM	A-200

AFFIDAVITS OF MARK C. RUTZICK AND JUSTICE
PAUL KELLY

A-203

LETTER FROM PETITIONER'S COUNSEL TO JUDGE
PLATT, FEBRUARY 7, 1977

A-205

LETTER FROM PETITIONER'S COUNSEL TO JUDGE
PLATT, FEBRUARY 22, 1977

A-208

EXCERPT FROM PETITIONER'S MEMORANDUM OF LAW

A-215

EXCERPT FROM PETITIONER'S REPLY MEMORANDUM

A-218

MR. CESTARO: -- -- May the record indicate that the Defense counsel has been reading from the probation report, a probation report?

THE COURT: All right, yes, let the record so indicate:

Q So there is nothing in the past childhood, Doctor, that we would consider unfavorable to the Defendant, would we?

MR. CESTARO: I object to that.

Q With respect to his relationship as to his mother and father, as far as you know?

MR. CESTARO: I object to the question.

Q Just yes or no?

THE COURT: I will permit the answer.

A The answer is yes.

Q Well, look at that portion that you showed me, Doctor, and see if there is anything there that would indicate anything unfavorable about his relationship with his mother and father?

A Not with the mother and father.

Q Okay, thank you. Now, Doctor -- --

A -- -- There is additional information from a brother.

Q Doctor, with respect to examination of the Defendant at that particular time, did you find anything with regard to the Defendant's responses to the questions, which indicated that he was overly jealous?

A Overly jealous?

Q Yes.

A Well, there was a tendency towards suspiciousness and enviousness, yes. Yes, jealousy was present.

Q In what manner, Doctor?

A Well, he spoke -- -- He had certain distortions in this thinking, I thought distortions that exaggerated his importance as an individual in relationship to other people.

Q In what manner, Doctor?

A Well, for example, he claims in his statement that the Complainant was spurned by him, and that was why she reported him to the police.

Q Well now, we are talking about the particular offense in question, is that correct?

A No. No, I thought I answered your question with reference to whether or not he was jealous or envious, and I believe that this is a manifestation of a paranoid trend in his functioning, in his ideas and in the way

he behaves.

Q Doctor, other than the examination in question, have you ever examined the Defendant since then?

A No. I have observed him in the courtroom, that's all.

Q Are there tests that psychologists and psychiatrists use in which they can reveal the underlying structure of the Defendant's behavior?

A Not of his behavior, of his personality organization.

Q And would one of those tests be a Rorschach test?

A That is a test that is used, one of them.

Q Did you administer a Rorschach test to David Hollis?

A It was not indicated.

Q Did you ever review any of the records of the Defendant while he was in Clinton Prison?

A I did not.

Q Did you ever learn at any time before you took the stand that while he was in Clinton Prison, they recommended no treatment for the Defendant? Did you ever learn that, Doctor, recently?

A No.

Q Did you ever see what purported to be a copy of the report of Clinton Prison, at any time, either by me or somebody else?

A Just once by you.

Q And did that report indicate that no treatment was recommended?

A No, but that he was doing well in prison.

Q And did it not conclude, Doctor, that no treatment was recommended at that particular time?

A I don't know who saw him or who did not recommend or who did recommend treatment, but it is a known fact that there are many people who need treatment and do not get it. They are not under what I would call ideal circumstances. Under ideal circumstances, they might get it, but being in prison is not an ideal environment.

Q Do you remember, Doctor, the report stating anything about no treatment being recommended?

A I don't remember anything about no treatment in the report, no.

Q Now, Doctor, can we say that an anti-social personality is a personality where the individual has failed to develop a sufficient conscience to control his instinctive impulses?

MR. CESTARO: Objection, Judge.

THE COURT: Objection overruled.

A That's one description.

Q And isn't it true, Doctor, that as a person matures, at times with age, the conscience or the super-ego, or however you want to refer to it, sometimes develops and matures with him?

A That happens, but the most important time is in the earliest years of development, that is, childhood. Not in adulthood.

Q Doctor, is it likely that an individual such as David Hollis would be capable of writing a serious article for publication about certain particular areas?

MR. CESTARO: Objection.

Q In society?

MR. CESTARO: Objection, Judge.

THE COURT: Well, we have an expert witness.

I will permit it.

A There is no impairment of his intellectual function. He could do that.

THE COURT: Did you say there was no impairment of his intellectual functions?

THE WITNESS: No, there is no impairment of his

intellectual function or functions. No, he has a very good intelligence. He is not well-educated, but he has an excellently-endowed intelligence.

THE COURT: Thank you.

MR. MEYERS: No further questions.

MR. CESTARO: I just have one or two questions, Your Honor.

REDIRECT EXAMINATION BY MR. CESTARO:

Q Is there anything in the probation report which indicates any unfavorable or favorable relationship between this Defendant and his brother?

A Yes, there is. There is a brother, Ulysses. He is a mailman, lives in Georgia, and by correspondence, we find that the offender's brother indicates that Mr. Hollis was somewhat of a problem to his family during his youth, and he did not respond well to the disciplinary actions undertaken by the parents.

Q One further question, Doctor: Can you describe for us briefly the personality disorder which you diagnosed in the Defendant?

MR. MEYERS: Objection.

THE COURT: What is the question again?

(Whereupon, the question was read back by the

reporter.)

THE COURT: Oh, I will permit it.

A Well, it is a person that is, because of a defect or a pathological trend in his personality organization, is always in trouble. They don't learn by punishment or by experience. They rarely, if ever, make any lasting relationships. This is the reason that it is so difficult to treat them. We treat through relationships and they are unable to do this. A person with this kind of personality organization is unable to make this kind of relationship.

Now, they are frequently emotionally immature. In other words, they emotionally react or inappropriately react to stimuli. Their judgment is generally impaired and they are very frequently, depending upon the amount of intelligence that they are endowed with, they can offer a lot of reasons and justifications for their behavior, to make it appear warranted and justifiable.

MR. CESTARO: No further questions.

THE COURT: All right, any other questions?

MR. MEYERS: Just two questions, Your Honor.

RE CROSS EXAMINATION BY MR. MEYERS:

Q Doctor, with respect to your examination of the

Defendant on that November 14th, is there anything with regard to the Defendant's responses to your questions which indicated to you that he couldn't maintain lasting relationships?

A Not alone from my questions.

Q Just in his response to your questions?

A Not alone from my questions, but from the entire examination, yes.

Q Isn't it true, Doctor, that he told you that at this time he was donating a substantial portion of funds that he was able to earn while he was in prison towards retarded children?

A He did say that. He said that he felt a need to do this.

Q All right, and did he also -- --

A -- -- He also said that he was a very religious man.

Q Did you believe him when he said that, Doctor?

A Well, we checked on it, that is the history, and the history doesn't indicate any -- -- It is not verifiable.

Q Well, with respect to the donation of funds to a retarded home and retarded children, is that verified?

A I didn't find it. I didn't inquire about that.

I believe you told me that you found it was verified. We checked -- -- the report checks on his religious affiliation and there is no way of confirming whether what he says is valid, that he belonged to a synagogue.

Q Did you find anything in his answers to you, towards the questions that you gave him, which indicated that he was emotionally immature, other than his discussion with you concerning the particular offense which he was charged, which he pleaded guilty to?

A Well, I would say that some of the answers and the stories he told would indicate that he didn't think very much of my intelligence or my training or experience. Or the other way around -- -- that he felt that he was superior.

Q In any event, you would conclude that because he acted in that way, that he was emotionally immature?

A Well, I would say that was a judgment on his part that was very poor.

Q I beg your pardon?

A I would say that was a judgment that was very poor on his part.

Q Other than his discussion, other than his discussion of the particular offense which he was accused

of, did you notice anything in his judgment, about his judgment that was impaired?

A From the entire examination, yes.

Q No, just from his answers to your questions.

A I don't limit it to answers from my questions. My examination includes the whole past history.

Q I see. Well, with regard to answers to the questions, did you notice anything about his judgment being impaired?

A Insofar as he assumed that he was superior to me in knowledge of human behavior, yes.

Q Well, how did he consider himself to be superior to you?

A Well, he told me stories that were entirely contrary to the report that we had; and when this was pointed out to him, he explained it in such a way, as I explained before, that the complainant was spurned by him and, therefore, she reported him.

Q You are talking about the particular offense, and other than talking about the particular offense, was there anything else that led you to conclude that?

A Yes, that he has a history of anti-social behavior that dates back to 1948, with a police record that

has been verified by correspondence and this probation report.

Q Well, Doctor, wouldn't you consider an individual who was before you for an examination in the jail, that this individual might very well give guarded answers to the questions asked of him?

A Yes, they usually do.

Q In other words, he understands, Doctor, that the answers he gives to you might determine whether he is going to be a free man or not, and he would give an answer which he thinks might be more favorable toward your consideration of his case?

A That would be true.

Q So that if he told you something about the act which might contradict what you know about the act, it is perfectly reasonable and logical for an individual to do that, isn't that true, doctor?

A Yes, that would be true.

Q Doctor, if the individual that we are talking about, any individual who has this anti-social personality, did establish loyalty towards, let us say, a particular group, cause or something on that order and did become associated with various causes within the society, wouldn't

this be something that you would consider a healthy turn of events?

A Yes.

Q And might you not conclude, Doctor -- -- withdrawn -- -- In your report that you rendered, you didn't -- -- withdrawn.

MR. MEYERS: No further questions.

THE COURT: Counsel?

MR. CESTARO: No further questions.

THE COURT: All right, thank you very much, Doctor.

MR. MEYERS: Now, may we approach the bench now, Doctor. I mean Judge, may we approach the bench?

THE COURT: Yes.

(Conference at the bench between the Court, Mr. Cestaro and Mr. Meyers, without the hearing of the reporter.)

THE COURT: All right, I will declare a five-minute recess.

(Recess.)

(After recess.)

THE CLERK: People versus David Hollis. Hearing

continued.

MR. CESTARO: The people rest.

THE COURT: All right.

MR. MEYERS: The Defendant will take the stand.

D A V I D H. O L L I S, the Defendant, after having been
first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MEYERS:

Q David, in 1965, when you pleaded guilty to
assault, two, with the intent to rape -- -- is that cor-
rect?

A Yes, I did.

Q And were you guilty of that particular charge?

A Yes, I was.

Q And then, subsequent to that, you were sent to
Clinton Prison, is that right?

A Yes.

Q And while you were at Clinton Prison, you re-
ceived treatment?

A Yes, I did.

Q In other words, you spoke to a psychiatrist,
is that right?

A Yes.

Q And did anything happen to you in a religious

way while you were in Clinton Prison?

A Yes, sir.

Q Tell the Court what happened?

A Well, while I was stationed up at Clinton Prison, I started to write articles, and the psychiatrist I was going to -- -- I was going to therapy classes there -- --

THE COURT: -- -- What is that?

THE DEFENDANT: I was going to therapy in Clinton Prison, and the psychiatrist suggested that the members of the therapy write articles concerning some story or something, and I did. It was favorable. My articles was favorable, and so I began to write; and afterward, came the March of -- -- They wanted the inmates to do something, to do something, you know, for the March of Dimes, so I worked a month and donated my pay to the March of Dimes; so during a discussion with another inmate, which was a very religious guy, he asked me, he says, "Why don't we study retardation?" And I says, "Fine," and I said, "How would we get in contact to do this?" And he says, "Well, talk to Reverend Willer," and we did and Reverend Willer suggested that we might write a doctor that he knew in Pennsylvania, in Dover,

Pennsylvania, a Dr. Henry; and I wrote Dr. Henry in Pennsylvania about this course, and he suggested me to another doctor in Texas, and through the doctor in Texas, I was recommended to other doctors, and the courses were too much money for me, and so I worked six months in order to pay tuition fee for this course.

Q Did you take a course eventually?

A Yes, I got a scholarship.

THE COURT: What course was it?

THE WITNESS: Retardation.

THE COURT: A course in retardation?

THE DEFENDANT: Religious course of how to communicate with retarded children.

THE COURT: Oh, a religious course, is that it?

THE DEFENDANT: Yes.

Q David, does this (indicating) have anything to do with this course?

A Yes, it does.

Q And what is that?

A That's a diploma from the Voice of Prophecy.

Q And is that the diploma that you got for taking those particular courses?

A Well, this is one of them.

Q And you got two diplomas?

A Well, I have more.

Q Is this another one of the diplomas (indicating) that you received for courses that you took in the field of retardation?

A Yes, it is.

Q Now, while you were in prison, did you earn money?

A Yes, sir.

Q And what did you do with the money that you earned?

A Well, I donated it to the Retardation Fund, National Association for Retarded Children.

Q Do you smoke, by the way, David?

A I smoked when I first was arrested, but I gave it up. I sacrificed.

Q Now, while you were in prison, did you write any articles?

A Yes, I did.

Q And did you submit any of those articles for publication?

A Yes, I did.

Q And do you remember the magazine that you submitted the article for publication to?

A Yes.

Q And what was the name of that magazine?

A Esquire Magazine.

Q And is the name of that article, "Should I Weep?"

A Yes, it is.

Q Now, I show you this document and ask you, is that the article you submitted for Esquire Magazine, for publication?

A Yes.

THE COURT: I think we ought to mark these for identification, the two certificates and the article.

(Whereupon, the two certificates and the article were received and marked respectively as Defendant's Exhibits A, B and C for identification.)

Q David, with respect to the Defendant's Exhibit C, the printed article there, what is that article about?

A "Should I Weep?"

Q Yes.

A It is a ritual article on the riots that we

was having.

THE COURT: On the what?

THE DEFENDANT: On the riots.

THE COURT: I can't hear you. You are talking too low.

Q Speak up, David.

A This article is based on the riots that we was having in our communities, and I was trying to write symbolically to the kids of the folly of black power and Stokely Carmichael and Rap Brown, and I wrote it in a symbolically religious tone, that they should not follow these men, that they would wind up where I was.

MR. MEYERS: I offer that article in evidence, Your Honor.

MR. CESTARO: I have no objection.

THE COURT: All right.

(Whereupon, Defendant's Exhibit C for identification was received in evidence as Defendant's Exhibit C.)

Q Now, David, did you write any other articles?

A Yes, I did.

Q And did you write an article about the assassination of President Kennedy and Dr. King?

A Yes, I did.

Q And what was the gist of that particular article?

A It was, the article that I wrote, it was more or less like a letter written symbolically of how the black and the white actually drew closer, and there was no hate there after these things had happened.

Q Is this true, David, that what you said in this article was that the assassins tricked themselves because by the death of Dr. King and President Kennedy, the sympathy of both the black and the white people became greater towards each other?

A Yes.

Q And that there was more understanding?

A Yes.

Q And that there was more love and tenderness between the people?

A Yes.

Q Which was diametrically opposed to what the assassins had intended?

A Yes. It was more favorable, yes.

Q Now, I show the article entitled "The Verdict is Yours, Mr. Assassinator." Is that the article we are talking about?

A Yes.

THE COURT: Mark it for identification.

(Whereupon, the said document, consisting of eight pages, was received and marked Defendant's Exhibit D for identification.)

Q This is the article that you wrote?

A Yes.

MR. MEYERS: Offer that in evidence.

MR. CESTARO: No objection.

THE COURT: Mark it in evidence.

(Whereupon, Defendant's Exhibit D for identification was received and marked Defendant's Exhibit D in evidence.)

Q Now, David, besides these two articles, you wrote numerous other articles, is that correct?

A Yes.

Q You have also written some poetry, is that correct?

A Yes, I did.

Q And is there anything you have done that you would like to mention to us, while you were in prison?

A Well, I did -- -- everything that I did there was constructable. I did it because I knew my probation

report. I knew that I had been pretty bad in the past. I knew, I was aware of everything that happened when these things actually happened, and as the doctors said -- -- well, they stated -- -- I don't remember if he stated that I was now emotionally immature, but I admit during the time that I was there, that I was emotionally immature. That was then.

Q In other words, David, you consider yourself a changed man now?

A Yes.

Q And you don't deny that you had committed various misdemeanors?

A No.

Q Various misdemeanor crimes?

A No, I don't.

Q From 1948 through 1965, is that correct, David?

A Yes.

Q And one felony, is that right?

A Yes.

MR. MEYERS: No further questions. Oh, by the way, I offer in evidence the two diplomas also.

MR. CESTARO: No objection.

THE COURT: Mark them.

(Whereupon, Defendant's Exhibit A for identification and Defendant's Exhibit B for identification were received in evidence as Defendant's Exhibits A and B.)

THE COURT: I'd like to see those exhibits.
Go ahead, Mr. Cestaro.

CROSS EXAMINATION BY MR. CESTARO:

Q Mr. Hollis, will you give us your birthdate, please?

A December 26th.

Q The 26th of December?

A Yes.

Q What year?

A 1933.

Q And you are 36 years old, approximately, is that right?

A Yes.

Q 35, 36?

A Yes.

Q Is that right?

A Yes.

Q Now, what date was it when you entered Clinton Prison, could you tell us?

A I entered Clinton Prison July the 6th or 7th.

Q Of what year?

A Of 1966.

Q And you have been there since, is that correct?

A Yes, sir, I have.

Q And isn't it a fact then that all these literary efforts of yours, and compositions, they all took place while you were in jail, is that correct?

A Pardon me, sir?

Q I will repeat the question. I will withdraw the prior question. Isn't it a fact that the literary efforts which you have described, the literary compositions, occurred while you were in jail, is that right?

A Yes.

Q And, of course, while you were in jail, you were in a controlled environment, is that right?

A Controlled environment?

MR. MEYERS: Objection.

THE COURT: No, I will permit it.

Q Do you understand me, sir?

A Would you explain "controlled environment?"

Q You don't understand me, is that correct, sir?

Do you understand the question?

A Well, I understand "controlled environment," yes.

Q Well, what you did then, you did while you were in jail?

A Yes.

Q That's as simple as I can put it, is that correct?

A Yes.

Q Now, you had been in and out of jails prior to 1966, isn't that correct?

MR. MEYERS: Objection. That's already conceded.

THE COURT: I will allow it. It's cross examination.

Q Is that correct?

A Yes, I had.

Q And could you tell us approximately how many times you have been committed to a jail and then released, say, from 1948 to 1966?

A Approximately six or seven times.

Q On each one of those occasion after you were released from jail, isn't it a fact that you then got yourself in trouble again?

A Yes, I did.

Q And you were arrested and jailed again, is that correct?

A I was arrested and in jail now, yes.

Q Well, I mean on these prior occasions?

A Yes.

Q You were arrested, jailed and then released?

A Yes.

Q Is that correct?

A Yes.

Q Now, in between the times when you were released from jail and then entered jail again, did you engage in any literary compositions or work rather?

A No.

Q Did you engage in any religious activities?

A Not prior to this time, no.

Q All right, so you would say this is the first time this has happened, is that right?

A Institutionally, yes.

THE COURT: What?

THE DEFENDANT: Institutionally, yes.

THE COURT: All right.

Q And isn't it a fact, Mr. Hollis, that every time

you were released from jail, you committed a crime which was of a greater degree of violence than you had the prior time?

MR. MEYERS: Objection.

THE COURT: What is the purpose of this line of questioning?

MR. CESTARO: The purpose, if Your Honor please, is to merely show that this Defendant can, while he is in a controlled environment, behave in a rational and non-dangerous way, but that once he is released, he becomes a danger to society and cannot control himself.

THE COURT: Well, I will sustain an objection. That doesn't necessarily follow.

MR. CESTARO: All right.

THE COURT: I will sustain the objection.

MR. CESTARO: Well then, I have no further questions, if Your Honor please.

MR. MEYERS: No further questions.

THE COURT: All right.

MR. MEYERS: That is the Defendant's case, Your Honor.

THE COURT: All right.

THE CLERK: The Defendant rests?

MR. MEYERS: Yes, the Defendant rests.

THE COURT: Do you want to make any remarks here as to this?

MR. MEYERS: Yes, I do.

THE COURT: How about you, Mr. Cestaro?

MR. CESTARO: Very briefly, if Your Honor please.

THE COURT: Well, let him go first and then you can go.

MR. MEYERS: Your Honor, briefly, two doctors both said they examined the Defendant. On cross examination and even on direct, they told what the intention of their examination was, but never stated what it was that led them to any conclusion about an anti-social personality. They said that he was intelligent, that he knew where he was, that he answered and responded to all their questions fairly accurate, that he was acting rather guardedly, but admittedly in this type of situation; and the doctor just admitted he understood why a person in this type of situation would act guardedly. It would seem that under the definition, that the first

doctor acknowledged this anti-social personality was -- -- He said there was no evidence to indicate -- -- Well, Dr. Peckstein admitted that a mere history of legal or social offenses is not sufficient to justify a diagnosis of an anti-social personality.

Now, other than the fact that this Defendant did commit a period of crimes from 1948 to 1965, all of which, except for the last one, were misdemeanors, as far as my record indicates, there is no evidence, there was no evidence that he had, that he was incapable of significant loyalties to individual groups or social values at that particular time of the examination in '68, or that he was grossly selfish, callous, irresponsible or impulsive in 1968; because this is when we are supposed to determine when and whether he has the anti-social personality.

The definition that Dr. Peckstein agreed to rules out the diagnosis, if you base your diagnosis upon repeated acts, and the only thing that they know about the Defendant is that he had a prior criminal record. It was admitted by Dr. Sutton that

in certain instances a Rorschach test would indicate, would go through this sort of guarded situation that might exist in just an initial diagnosis that took place at the jail, but no Rorschach test was ever administered to this Defendant, although that might show what the internal conflicts are with respect to this Defendant's mind at the particular time, 1968, when we are supposed to determine his situation. The Defendant, and it is not rebutted, since 1966 or '65 has changed significantly in his outlook towards both society and himself. He has published a series of articles which are admitted into evidence. He has taken courses in religion and in helping retarded children. He has given a significant portion of money that he earned while he was in prison to the retarded children, and all of these particular attributes show that he has now acquired a significant loyalty to individual groups or causes, either Civil Rights, the negro cause in general or to his love for mankind.

There is nothing that Dr. Peckstein or Dr. Sutton testified to which indicates that they were able to find any objective symptom which would in-

dicade that he has the diagnosis of an anti-social personality. Furthermore, once you decide, even if you decide that he has an anti-social personality, that is not the test of whether or not the individual should be confined. The question is whether he would be a danger to society in a sexual way. In accordance with the case of People v. Bailey, which was the case that set down these hearings, it would seem that there was nothing to indicate by either one of the doctors that this individual would be a danger to society in the future, once again referring to People v. Bailey, and at most, the examination that they had of this Defendant was really a very, very brief examination. Although the doctor said it was approximately 30 to 40 minutes, it would appear that there was only a group of five or six questions posed to the Defendant, and other than his name and date and the fact of an explanation of the events leading up to that particular crime that he was accused of, there seems to be nothing which took place at this examination; so we must conclude that the doctors' diagnoses is primarily based upon the fact that the Defendant

has a history of recidivism, but Dr. Peckstein agreed that the mere fact that an individual is a recidivist does not mean that he has this anti-social personality or that in the future he would be considered a danger to society.

Thank you.

MR. CESTARO: If Your Honor please, I believe that if you take into consideration the Defendant's history, we must conclude that he is a danger to society and has been a danger to society right up until 1966. The nature of the crimes which he committed -- --

THE COURT: -- -- Well, I am not looking so much about whether he is a danger to society or not. What I am looking for is, does he have this mental condition that would warrant this particular type of sentence?

MR. CESTARO: I understand that, Judge, but in order to determine whether or not he still has this mental condition, I think a consideration of his past history is in order.

THE COURT: Oh, I agree with that.

MR. CESTARO: As indicating a continuing condi-

tion, number one.

THE COURT: I agree with that.

MR. CESTARO: The entire record shows that while he is in a controlled environment, he can, rather, while he is in a controlled environment, there is no opportunity for him to commit any acts, any crimes, any sexual acts of violence, but that once he is released or once he was released in the past from a controlled environment, he returned to his activities, which indicates that he cannot control himself.

Now, insofar as his present condition is concerned, both Dr. Sutton and Dr. Peckstein find that he is still suffering from a mental disorder and a personality disorder. Dr. Sutton did state that the Defendant does not have a psychosis, but that he has a slight paranoid tendency. Dr. Peckstein found that the paranoid condition exists a little more strongly, or at least he described it as existing more strongly than Dr. Sutton did. Dr. Peckstein definitely did state that this man needs treatment and needs it in a controlled environment. He used the words "closed environment." Dr. Sutton, it is true, did not testify to that particular point, but

both of them, I repeat, testified that the mental condition, the mental disorder which has led this Defendant to act as he has in the past is still with the Defendant and he is still suffering from that mental disorder.

THE COURT: All right.

MR. MEYERS: Well, if I may state -- -- No, let me withdraw that, it is not necessary.

THE COURT: All right. With reference to the motion to preclude the probation report, I am going to grant that. I won't take that into consideration. I will reserve decision.

MR. MEYERS: Thank you. Your Honor, do you want a controlled date on this?

THE COURT: What's that?

MR. MEYERS: Do you want a controlled date?

THE COURT: Yes, we will have a decision by Friday.

- - -

I certify that the foregoing is a true and accurate transcript.

James I. Smith

APPENDIX A

(Psychiatric Report, Dated November 18, 1968)

November 18, 1968

THE HON. PAUL KELLY
County Court
County of Nassau
260 Old Country Road
Mineola, New York 11501
Re: David Hollis—P540

Indictment No. 20,287; 20,656

Dear Sir:

Pursuant to your court order of October 28, 1968, James F. Collins, M.D., Superintendent of Meadowbrook Hospital, appointed H. Lawrence Sutton, M.D. and Henry Pechstein, M.D., qualified psychiatrists, to examine David Hollis, under Section 2189a of the Penal Law. The defendant was examined November 14, 1968.

The probation report was reviewed, and the prisoner was examined between the hours of 2:30 and 3:15 p.m. He depicted himself now as a paramour of the woman who accused him of rap. He also believes he has seen the light that he has to atone for his previous crimes by contributing funds to the mentally retarded children and he sees himself as quite a holy man. However, he readily admitted that he has committed many crimes in the past though he denied that the two sexual offenses to which he has pled guilty were crimes. He states that he was told by his attorney to plead guilty to these crimes which he now contends he did not commit. His effect was quite flat. He seemed to believe everything he stated which is in direct opposition to previous pleas of guilty and to the long legal record.

Appendix A

The examiners believe this man is suffering from an anti-social personality to a severe degree, that he has sexual problems, that he definitely knows right from wrong in talking about previous acts but that nevertheless he commits the acts. From his past history the examiners believe that he has shown time and again that he is dangerous, that he has committed many crimes, and that the sexual crimes to which he pled guilty are evidence of a personality deterioration, especially when considering the circumstances. He showed extremely poor judgment in both circumstances, one in picking on a young child, and the other on a woman whom he knew could definitely identify him and would press charges against him. Neither was an act of seduction but definitely both were acts of impetuous rape.

Therefore the examiners believe he is dangerous to society and requires further care and treatment in a closed setting under the care of the Department of Correction. He has shown in the past that he cannot be trusted to stay on his word; i.e., he jumped bail and the examiners believe that any incarceration in a hospital under the Department of Mental Hygiene would not be sufficient to hold him and keep him from escaping. He stated he has had therapy at Sing Sing and at Clinton Prison, and that he has benefited thereby. The examiners believe further therapy is necessary and that he is amenable to therapy.

Very truly yours,

J. MARTIN SEMER, M.D.
Chairman
Department of Psychiatry

HP:srw

APPENDIX B

(Decision-Order of Kelly, C. J., Granted
February 20, 1969)

COUNTY COURT

NASSAU COUNTY

SPECIAL TERM—PART I

Indictments #20,287 and 20,656

Present:

HON PAUL KELLY, *County Judge*.

The defendant had been sentenced after conviction by a plea of guilty, of Assault with Intent to Rape, to a term of one day to life, such sentence being imposed on the 8th day of December, 1965. This sentence has been set aside, and the case has been returned to this Court so as to permit the Court to hold a hearing pursuant to § 2189A of the former Penal Law.

This hearing commenced January 21, 1969. The People produced two witnesses, both qualified psychiatrists, Henry Pechstein, M.D. and H. L. Sutton, M.D., who testified that they had examined the defendant in the Nassau County Jail and that based on this examination, together with the history given them by the defendant, as well as information gathered from his probation report, their recommendation was that defendant should be continued in a controlled setting. They made this finding based upon their analysis of defendant's sexual problems. They felt that only in such a setting could he receive the treatment that could possibly restore him to a mental state that would permit him to return to society, but that as of this date, he was unable to control his emotions; that if turned loose he would revert to his former sexual mores; that he would be a danger to society and the community if released at this time. The defendant took the witness stand on his own behalf

Appendix B

and alleged that while he committed the sexual offenses in the past, that during his incarceration had gotten "religion" and joined a religious movement and was perfectly able to carry on outside.

Based on all of the testimony, I now find that the defendant is not capable to being returned to society; that he definitely would present a danger to society, if released at this time, and that in a continued controlled environment, there is a possibility that he may be benefited by the treatment which he will be afforded. Accordingly, it is

ORDERED that the defendant shall be brought before the Court on February 27th, 1969, for the purpose of having sentence imposed.

Enter

P. KELLY

Granted--February 20, 1969
HAROLD W. McCONNELL
Clerk

COUNTY COURT : NASSAU COUNTY
PART I

-----X
PEOPLE OF THE STATE OF NEW YORK :

-against- :

DAVID HOLLIS, :

Defendant. :

Ind. No. 20656

-----X
Mineola, New York,
February 25, 1969.

B e f o r e :

HON. PAUL KELLY,

County Court Judge.

A p p e a r a n c e s :

DONALD CLAVIN, ESQ.,
Assistant District Attorney,
For the People.

JAMES J. McDONOUGH, ESQ.,
Legal Aid Society,
By: MICHAEL MEYERS, ESQ., of counsel,
For the Defendant.

- - -
MINUTES OF SENTENCE
- - -

THE CLERK: People versus David Hollis. You
are David Hollis?

THE DEFENDANT: I am.

THE CLERK: You appear with the Legal Aid, by

Michael Meyers as counsel?

THE DEFENDANT: I do.

THE CLERK: You are entitled to a legal delay of 48 hours before sentence is imposed. You wish to waive this delay and be sentenced now?

MR. MEYERS: Yes.

THE DEFENDANT: Yes.

THE CLERK: Do you have any legal cause to show why judgment should not be pronounced against you?

THE DEFENDANT: Yes, I do.

THE CLERK: The Defendant states he has a legal cause.

THE COURT: All right, what is the cause?

THE DEFENDANT: Well, I have been away. Do I have a legal cause? No, I don't have a legal cause, I'm sorry.

THE CLERK: All right, I will repeat it. Do you have any legal cause to show why judgment should not be pronounced against you?

THE DEFENDANT: No, I don't.

THE CLERK: Give your attention to the Court.

THE COURT: What did he plead to?

MR. CLAVIN: It's assault, second degree, with intent to commit rape.

THE COURT: David Hollis, you stand before this Court on your plea of guilty of assault, second degree, with intent to commit rape, in satisfaction of the indictment. This plea was taken back on September 23, 1965. The hearing having been held and the results of that hearing having been determined, it is the sentence of this Court that on your plea, that you be sentenced to Sing Sing State Prison, at Ossining, New York, at hard labor, for an indeterminate term, the maximum of which will be your natural life, the minimum of that will be one day.

- - -

I certify that the foregoing is a true and accurate transcript.

Edward J. [Signature]



[Handwritten signature]

STATE OF NEW YORK
DEPARTMENT OF LAW

TWO WORLD TRADE CENTER
NEW YORK, N.Y. 10047
TELEPHONE: 488-3442

MARIA L. MARCUS
ASSISTANT ATTORNEY GENERAL
IN CHARGE OF
LITIGATION BUREAU

November 17, 1976

Re: Hollis v. Smith
76 Civ. 1093

Hon. Thomas C. Platt, Jr.
United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, N.Y. 11201

ATT: Fred Townsend

Dear Judge Platt:

I enclose copies of the Appellate Division
briefs in the above captioned matter, as requested by
Mr. Townsend.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General
By

[Handwritten signature of Mark C. Rutzick]

MARK C. RUTZICK
Assistant Attorney General

MCR:kd
Encl.

EXCERPT FROM DEFENDANT'S APPELLATE DIVISION
BRIEF IN PEOPLE v. DAVID HOLLIS

donated his prison pay to the National Association for Retarded Children (83).

The witness considered himself a changed man from the person he had been from 1948-1965 (93)

ARGUMENT

POINT ONE

THE PSYCHIATRIC REPORT SUBMITTED PURSUANT
TO SECTION 2189-a OF THE PENAL LAW WAS
INSUFFICIENT AS A MATTER OF LAW.

On November 14, 1968, pursuant to an order of the Nassau County Court, the appellant was examined by H. Lawrence Sutton, M.D., and Henry Peckstein, M.D., qualified psychiatrists and pursuant thereto a report was forwarded to the court. This report, however, did not sufficiently discuss and analyze the defendant's sexual problem as of the time resentencing. Furthermore, it does not contain any allegation to the effect upon society of the appellant's immediate release with treatment on an outpatient basis. For these reasons the appellant contends that the psychiatric report was inadequate and did not meet the requirements as set forth under Section 2189-a of the Penal Law. People v. Kearse, 28 A.D. 2d 910 (2nd Dept. 1967), People v. Jackson, 20 A.D. 2d 170 (3rd Dept. 1963).

In determining whether an indeterminate one day to life sentence is appropriate, reference must be made to the legislative intent in enacting such a method of treating certain offenders.

The amending and implementing statute (L. 1950, ch. 525) was entitled "An act to amend the mental hygiene law, the

correction law, the penal law and the code of criminal procedure, in relation to the sentence, study, diagnosis and treatment of persons convicted of certain crimes." As the title of the statute suggests, its prime purpose was to bring about a system of mandatory psychiatric treatment for person convicted of certain crimes who appeared, upon the basis of a psychiatric examination at the time of sentencing, to have a reasonable chance of improvement by virtue of continued treatment so as to eventually be released when sufficient improvement was shown. It cannot be denied, however, that the legislature was aware of the fact that a certain proportion of such offenders would not yield to treatment of any sort, and as a result, might very well spend the duration of their natural lives in custody.

Appellant contends, however, that where a report indicates that a defendant will benefit from psychiatric treatment, there must be a very clear, fully evaluated and clearly explained report that treatment will be given. People v. Jackson, supra at 174. In this case, neither physician was aware of what had been done for defendant since 1965 and of course could not know what had been done for defendant during this time.

The report in the present case states:

November 18, 1968

"The Hon. Paul Kelly
County Court
County of Nassau
260 Old County Road
Mineola, New York 11501

Re: David Hollis - P540
Indictment No. 20,287,20,650

Dear Sir:

Pursuant to your court order of October 28, 1968,

James F. Collins, M.D., Superintendent of Meadowbrook Hospital, appointed M. Lawrence Sutton, M.D. and Henry Pechstein, M.D., qualified psychiatrists to examine David Hollis, under Section 2189a of the Penal Law. The defendant was examined November 14, 1968.

The Probation report was reviewed, and the prisoner was examined between the hours of 1:30 and 3:15 p.m. He depicted himself now as a paramour of the woman who accused him of rape. He also believes he has seen the light that he has to atone for his previous crimes by contributing funds to the mentally retarded children and he sees himself as quite a holy man. However, he readily admitted that he has committed many crimes in the past though he denied that the two sexual offenses to which he has pled guilty were crimes. He states that he was told by his attorney to plead guilty to these crimes which he now contends he did not commit. His affect was quite flat. He seemed to believe everything he stated which is in direct opposition to previous pleas of guilty and to the long legal record.

The examiners believe this man is suffering from an anti-social personality to a severe degree, that he has sexual problems, that he definitely knows right from wrong in talking about previous acts but that nevertheless he commits the acts. From his past history the examiners believe that he has shown time and again that he is dangerous, that he has committed many crimes, and that the sexual crimes to which he pled guilty are evidence of a personality deterioration, especially when considering the circumstances. He showed extremely poor judgment in both circumstances, one in picking on a young child, and the other on a woman whom he knows could definitely identify him and would press charges against him. Neither was an act of seduction but definitely both were acts of impetuous rape.

Therefore the examiners believe he is dangerous to society and requires further care and treatment in a closed setting under the care of the Department of Correction. He has shown in the past that he cannot be trusted to stay on his word; i.e., he jumped bail and the examiners believe that any incarceration in a hospital under the Department of Mental Hygiene would not be sufficient to hold him and keep him from escaping. He stated he has had therapy at Sing Sing and at Clinton Prison, and that he had benefited thereby. The examiners believe further therapy is necessary and that he is amenable to therapy.

Yours very truly,

"J. Martin Semer, M.D."
Chairman
Department of Psychiatry.

But as with the psychiatric reports in People v. Bailey, 21 NY 2d 599,598 there is no discussion of defendant's sexual problems and for that matter the report does not even state that he has a problem. The best that can be said is that the report concludes that the sexual crimes to which defendant pleaded guilty are evidence of personality deterioration. But this is no discussion of a sexual problem or an indication that defendant is likely to engage in violent sexual misconduct in the future.

People v. Bailey at 595 also states that a report is inadequate if it does not state the risk to society involved in the defendant's immediate release, with or without treatment and defendant's potential for responding to treatment.

The present report does say defendant is suffering from "an anti-social personality"; and that "he is dangerous to society". These conclusions, however, are not related to any sexual problem, but are general comments with regard to defendant's personality.

The mere fact though that defendant committed a sex crime is not justification for the one day to life sentence unless the sex crime manifests some sexual problem. See People v. Kearse, supra. In this case the report fails to find that any sexual problem of the defendant causes him to be a danger to society or to have an "anti-social" personality.

We also urge that the examination and report was inadequate as it failed to consider what if any treatment defendant received from 1965 until the date of the present examination.

A 2189a examination must be current and pertinent to the statutory purpose. People ex rel Lawson v. Denno 9 NY 2d 181. Thus, since 2189a requires that the defendant receive a psychiatric examination every two years, it is hard to see how the doctors could conduct an examination of defendant and ignore his history for a period of four years (during which period examination must have been had of defendant) when according to their testimony at the hearing defendant's history played an important factor in their decision making process.

All in all the report in question is inadequate for it fails to discuss defendant's sexual problem or even state that he has one. A possible life sentence must rest on some firmer foundation.

POINT TWO

THE SENTENCING PROCEDURE IN THE COURT BELOW WAS UNCONSTITUTIONAL.

The appellant contends that the imposition of an indeterminate sentence of from one day to life was unconstitutional and in that he was entitled to a trial by jury* on the question of whether he was capable of benefitting from the confinement envisaged under the statutory scheme of Section 2189a, Penal Law, or was a danger to society. He also contends that the procedures prescribed for the psychiatric examination violated his privilege

*Prior to the hearing defense counsel requested a trial by jury.

against self-incrimination as well as his right to have an attorney present during each and every stage of the criminal proceeding and that proof of his being capable of benefitting from confinement or of his being a danger to society should have been shown beyond a reasonable doubt and not merely by a preponderance of the evidence.

The ant was entitled to a trial by
: jury question of whether he was
 capital benefitting from confinement or
 if he was a danger to society.

Only if it is found that a person is a danger to society or is capable of being benefitted by the confinement envisaged by Section 2189a of the Penal Law may he be sentenced to serve an indeterminate term of from one day to the duration of his natural life. People v. Jackson, 20 A.D. 2d 170, 174 (3rd Dept. 1963); 21 A.D. 2d 843 (3rd Dept., 1964); People v. McCraw, 21 N.Y. 2d 588, 594. It seems clear that the primary purpose of the legislature in adopting Section 2189a of the Penal Law was to provide a method of rehabilitating sex offenders so as to enable them to return safely to society. Where, however, it was determined that psychiatric treatment during the term of the defendant's confinement would not appear to be beneficial, then the one day to life sentence might be imposed, not because life imprisonment was believed a just treatment but because no other reasonably safe alternative could be found. (People v. Jackson, supra at 172-173)

In a recent New York Court of Appeals decision, People v. Fuller, 24 N.Y. 2d 292, the Court held that the failure to accord a convicted narcotics addict a jury trial on the issue of his addiction violates the equal protection clause of the Fourteenth Amendment. It is interesting to note that this right to a trial by jury was held not be mandated under due process, since there was no showing that the detention compelled under §207 of the Mental Hygiene Law is in effect punitive but, rather, is intended solely for the addict's benefit. Because a jury trial on the issue of addiction is mandated for the civil commitment of narcotic addicts, however, a trial by jury was also required where the commitment was criminal in nature.

One cannot help but draw the obvious analogy between the above-mentioned case and the case at bar. Section 74 of the Mental Hygiene Law provides that where a patient desires to controvert a Court authorized commitment to a mental institution based upon the certificate of two examining physicians, he may petition a Justice of the Supreme Court, other than the Judge or Justice presiding over the Court making such order of commitment,

"who shall cause a jury to be summoned as in the case of proceedings for the appointment of committee for a mentally ill person where the question of fact arising upon the competency of the person is tried by a jury, and shall try the question of the mental illness of the person so authorized to be retained, in the same manner as provided in said proceedings."

In Baxtrom v. Herold, 383 U.S. 107, the United States Supreme Court held Section 384 of the New York Correction Law unconstitutional on equal protection grounds because it afforded a jury trial to all persons civilly committed as mentally ill, but not to those who had been hospitalized

pursuant to a criminal commitment and whose sentences were expiring. Following the dictate of Baxtrom, the New York Court of Appeals has held that a person acquitted of a crime by reason of insanity is entitled to a jury trial on the question of whether his own protection or the protection of society requires his continued detention. (People v. Lally, 19 N.Y. 2d 27).

In a recently decided case, United States ex rel Shuster v. Herold, 410 Fd 1071 (2 Cir 1969), the United States Court of Appeals for the Second Circuit held that before a prisoner may be transferred to a state institution for insane criminals, he must be afforded the same procedural safeguards as provided in civil commitments, including a trial by jury. In so ruling, the Court drew an analogy to People v. Fuller, supra, stating that they "could see no logic or reason for distinguishing Schuster's plight from Fuller's." The opinion further stressed the fact that "all distinctions between civilian and prisoner patients must be swept aside."

The appellant therefore contends that he should be afforded the benefit of the equal protection clause of the Fourteenth Amendment and, as such, be entitled to a trial by jury on the question of whether he is capable of benefitting from confinement or is a danger to society.

Aside from the equal protection argument, the appellant was entitled to a jury trial of the aforementioned issue as a matter of due process. Appellant does not contend that a jury trial is required as a matter of due process in every instance where the outcome may result in a deprivation of liberty.

As was stated in People v. Fuller, supra at 5, "(i)t is only

those curtailments of liberty which serve the traditional purposes of criminal law which require the full protection of a criminal trial."

Footnote 3 of Fuller is a most persuasive argument in behalf of appellant's position. In response to a contention by the People that the commitment of narcotics addicts was analagous to the one day to life sentence and did not require the application of all the constitutional guarantees applicable to criminal proceedings, the Court, in finding such guarantees not applicable, drew a sharp line of distinction between the commitment of an addict to the custody of the Narcotics Control Commission and the imposition of a one day to life sentence under Section 2189-a of the Penal Law:

3. The People contend that this is an independent sentencing proceeding similar to the one day to life sex offender statutes (Specht v. Patterson, 386 U.S.605; People v. Bailey, 21 N.Y. 2d 588; United States ex rel Gerchman v. Maroney, supra) and that Specht only requires the right to counsel, the right to confront witnesses and the right to present evidence. Although the issue has not been specifically decided, there are strong indications that, because of the possible additional period of deprivation of freedom involved, a higher burden of proof may be required [Specht v. Patterson, supra, 386 U.S. at 608; see, also, United States ex rel. Gerchman v. Maroney, supra, F. 2d at pp. 309-310 (D.C. Cir.)]. No doubt one goal of these statutes is to give a defendant special psychiatric help, but another principal purpose of the statute is to keep persons who are considered likely recidivists and dangerous to others in jail for an extended period. This is a normal attribute of criminal sentencing procedure, and all the protections of criminal proceedings, including the privilege against self-incrimination, access to counsel at all times, proof beyond a reasonable doubt and the right to a jury trial, may well apply.

See, also, People v. Michael O. (Anonymous) 22 N.Y. 2d 831.

The language of United States ex rel. Gerchman v. Maroney, 355 F. 2d 302, 309 (3rd Cir., 1966) makes it abundantly clear that the appellant's incarceration serves the traditional purposes of criminal sentencing and can in no way be regarded as a purely rehabilitative commitment designed for the benefit of the defendant. In speaking of the Barr-Walker Act, which provided for the commitment of convicted sex offenders for a term of from one day to life if it was shown that the defendant would "if at large constitute a threat of bodily harm to members of the public, or is an habitual offender and mentally ill," the Court noted that there was no doubt that the statute is criminal in nature and that what is imposed under its authority is criminal punishment. The fact that the Act provides for periodic psychiatric and psychological examination which the Board of Parole is to review makes it no less the inflection of criminal punishment, especially when this is accompanied by the drastic potentiation of life imprisonment if the examinations do not affirmatively provide a basis for release. Furthermore, the criminal punishment does not lose its characteristic because the Act goes beyond simple retribution.

"It would be archaic to limit the definition of punishment' [under the Bill of Attainder Clause] to 'retribution.' Punishment serves several purposes; retributive, rehabilitative, deterrent - and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any less punishment." United States v. Brown, 381 U.S. 437, 458; 85 S. Ct. 1707, 1720, 14 L.Ed. 2d 484 (1965). See, also

Kennedy v. Mendozz-Martinez, 372 U.S.
144, 169-169, 83 Ct. 554, 9 L.Ed. 2d
655 (1963): Case Comment, 32 U Chic. L.
Rev. 290, 294-298 (1965). (id)

Thus, the plight of the appellant in the instant case would certainly appear to be an attribute of criminal sentencing procedure and thus, within the language of Fuller. Therefore, the appellant should have been afforded a trial by jury as a matter of due process.

The sentencing procedure under Section 2189a of the Penal Law violated appellant's privilege against self-incrimination, his right to have the advice of counsel at all stages of the criminal proceedings and his right to have guilt proved beyond a reasonable doubt.

The imposition of an indeterminate sentence of from one day to life, unlike the commitment of narcotics addicts (People v. Fuller, supra) is an enlarged punishment for an essentially independent criminal offense. This is so because when the Court determines that a person is a danger to society or can benefit from extended incarceration, it is making a new factual finding which goes substantially beyond the finding of guilt of the underlying crime. Cf. People v. Michael O. [Anonymous] supra. It is this new finding which authorizes and requires the imposition of a sentence of from one day to life instead of the maximum provided by statute or the underlying crime in the absence of such a finding. (People ex rel. Gerchman v. Maroney, supra at 311). The Imposition of an indeterminate sentence, being essentially based upon an independent criminal finding, a defendant should be protected by the full panoply of constitutional rights and privileges if they are made applicable to the states by virtue of the Fourteenth Amendment.

Since the decision of the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436, it cannot be disputed that the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to the assistance of counsel are applicable whenever a person in custody is to be subjected to interrogation. While the Miranda decision dealt specifically with custodial police interrogation, as was stated in People v. Fuller, supra at 5 "(i) it is the reality that counts, not the metaphysical distinctions of the legal mind." The reality of the appellant's situation is that he had been confined in various penal institutions for several years when he was interviewed by Drs. Peckstein and Sutton. During the course of those many years he had had periodic interviews with psychiatrists. There is no reason why the appellant should be expected to attach more significance to this examination than any of the others which he had undergone. Nor could he realize that it would be these psychiatrists who, in their capacity as witnesses for the prosecution, would testify as to their impression of the appellant based upon their examination of him and whose testimony would serve as the basis for the reimposition of the indeterminate one day to life sentence, especially as one of the doctors testified he told prisoners nothing they said would be used against them.

Of great significance in this regard is a decision of a United States Army Board of Review in United States v. Hamlin, ____ U.S. Army Bd. Rev. ____; 4 Crim. Law. Rep. 2170, in

which the Miranda warnings were held applicable to a government psychiatrist. Quite reasonably, the determination of whether the warnings were required was there said to depend upon the extent to which the doctor was working for the prosecution. Since the officer-psychiatrist had examined the defendant in a stockade and later testified for the prosecution at trial and was well aware of the criminal investigatory context and motivation of his examination, the Miranda warnings were held to be required. The instant case clearly parallels the situation in Hamlin. The examining psychiatrists examined the appellant while he was in custody; they were fully aware of the criminal sanction which could be imposed as a result of their diagnosis and they testified as witnesses on behalf of the prosecution at the psychiatric hearing. There can be no doubt that this is the type of situation which the very essence of the Miranda decision sought to remedy. Thus, the appellant should not have been required to make any statements to the examining physicians and should have been afforded the opportunity of having an attorney present during such examination.

In view of the fact that, as has previously been shown, the sentencing procedure under Section 2189a constituted an essentially separate finding for which criminal punishment was imposed (Specht v. Patterson, 386 U.S. 605, United States ex rel. Gerchman v. Maroney, *supra*; People v. Fuller, *supra*), the due process clause of the Fifth and Fourteenth Amendments was fully applicable. (Specht v. Patterson, *supra* at 608). As was stated by Mr. Justice Frankfurter,

joined by Mr. Justice Black in a dissenting opinion in Leland
v. Oregon , 343 U.S. 790, 802-802:

"It is the duty of the Government to establish his guilt beyond a reasonable doubt. This notion-basic in our law and rightly one of the boasts of a free society - is a requirement and safeguard of due process of law in the historic procedural content of "due process."

Clearly, therefore, the burden of proof was upon the People to prove, beyond a reasonable doubt, that the appellant was a danger to society or was amenable to psychiatric treatment which would be provided under the statutory shema of Section 2189a of the Penal Law.

CONCLUSION

FOR THE ABOVE STATES REASONS, THE
JUDGMENT OF CONVICTION SHOULD BE
REVERSED.

Respectfully submmitted,

JAMES J. McDONOUGH
Attorney for Defendant
Attorney in Charge
Legal Aid Society of
Nassau County, N.Y.
Criminal Division
County Court House
Mineola, New York

OF COUNSEL

MATTHEW MURASKIN

EXCERPT FROM DISTRICT ATTORNEY'S APPELLATE
DIVISION BRIEF IN PEOPLE v. DAVID HOLLIS

4

POINT I

The psychiatric report as augmented by the hearing pursuant to Section 2189-a of the former Penal Law and *People v. Bailey*, sufficient as a matter of law. (In answer to Appellant's Brief, Point I.)

It is respectfully submitted that a perusal of the psychiatrists' report and the Court's decision after the hearing, clearly indicate that the record below is sufficient within the meaning and spirit of *People v. Bailey*, 21 N.Y. 2d 588. The report and the decision are included herein as Appendices for the convenience of this Court.

An examination of the statutory purpose as well as the weight of judicial authority indicate that the discretion of the sentencing Judge to mete out a one day to life sentence is limited to those cases in which the record indicates some basis for a finding that the defendant is a danger to society or is capable of being benefitted by the confinement envisaged under the statutory scheme. Absent such a basis, the sentence cannot stand (*People v. Bailey, supra*, p. 594; *People v. Jackson*, 20 A.D. 2d 170, 174 [1963], 21 A.D. 2d 843 [3rd Dept. 1964]; *People ex rel. Piatt v. LaValle*, 26 A.D. 2d 904 [4th Dept. 1966]; *People ex rel. Chumley v. Mancusi*, 26 A.D. 2d 905 [4th Dept., 1966]).

The People believe and respectfully submit that the test enunciated in *Bailey, supra*, has been met on both grounds in the case at bar.

The report in part states:

"The examiners believe this man is suffering from an anti-social personality to a severe degree, that he has sexual problems, that he definitely knows right from wrong in talking about previous acts but that nevertheless he commits the acts. From his past history the examiners believe that he has shown time and again that he is dangerous, that he has committed many crimes, and that the sexual crimes to which he pled guilty are evidence of a personality deterioration, especially when con-

sidering the circumstances. He showed extremely poor judgment in both circumstances, one in picking on a young child, and the other on a woman whom he knew could definitely identify him and would press charges against him. Neither was an act of seduction but definitely both were acts of impetuous rape."

A fair reading of the minutes of hearing reveals that Drs. Pechstein and Sutton believed that appellant was unable to control himself outside of a controlled environment. It appears that David Hollis had a personality problem which made him quite susceptible to act impulsively especially in his sexual drives. The Doctors documented that determination by the defendant's background, considering especially the two sexual involvements concerning a young child and a woman neighbor of his employer who obviously could identify him as stated in the above recited paragraph. It was clear to the Doctors that the sexual acts were impetuous *i.e.*, he was unable to control himself and not of a seductive nature as appellant claimed.

The Doctors believed that Hollis was dangerous to society and required thorough care and treatment in a closed setting. They were uncertain, even with all the treatment possible, through drugs and therapy in an institution, whether Hollis would respond favorably. Obviously, where the Doctors are uncertain with the prognosis even in a controlled environment, it is unrealistic to urge that out-patient treatment might be fruitful.

As for appellant's view that the psychiatric report was inadequate in that it failed to discuss defendant's sexual problems or even state that he had one, it need only be commented that a full hearing was accorded defendant in the lower court. The People's psychiatric testimony was subjected to thorough cross-examination by able defense counsel. Certainly, if the report failed to indicate any sexual problem at all, which it did not (see Appendix A), the opportunity was presented to the defendant to explore it at the hearing. We submit appellant thoroughly made

the Court aware of any and all defects which he claimed. Actually, the hearing minutes indicate that appellant in the lower Court was not of the opinion that he did not have any sexual problems, but that he merely had a bad past from 1948 to 1966 which he now had finally overcome. He based this opinion his claim that as a result of his being able to write articles concerning various subjects—of civil rights and on retardation that through religion he had now overcome his problems. This claim was not inconsistent with the Doctors' analysis.

It would appear that in view of the psychiatric examination and report, which of necessity included the probation report (history), coupled with the full and complete hearing in the lower Court, fully complied with the statutory purposes as determined in *People v. Bailey, supra*. Through the aforementioned reports and hearing, there was ample information provided to the sentencing Court to give it sufficient basis to make an intelligent decision on whether or not it should impose the day to life sentence.

We believe and respectfully submit that the lower Court, upon all of the proceedings herein, did not act arbitrarily, but based its judgment upon a sound discretion founded upon the hearing, the probation report and the psychiatric evidence which it heard (*People v. McCraw*, 33 A.D. 2d 577 [1969]).

Upon all of the foregoing, it is respectfully submitted as a matter of law, that the psychiatric report and other amplifying evidence adduced at the hearing was sufficient to permit the sentencing Court to impose the indeterminate day to life sentence pursuant to former Penal Law § 2189-a based upon the finding that Hollis was a danger to society and the community due to his sexual problems if released at this time, and that he could be benefitted by the confinement that could possibly restore him to a mental state that would permit him to return to society (*People v. Bailey, supra*; *People v. McCraw, supra*).

POINT II

The sentencing procedure in the lower court was constitutional.

Appellant suggests that the sentencing procedure below is unconstitutional under the equal protection clause in that it denies the appellant the right to a jury determination on the question of whether he was capable of benefiting from the confinement envisioned by Penal Law Section 2189-a. He also contends that the procedures prescribed for the psychiatric examination violated his privilege against self-incrimination, as well as his right to counsel during every stage of the criminal proceeding (see appellant's brief, Point II, page 12 etc.).

Clearly, there is no present statutory authority granting a jury trial in a hearing held pursuant to Section 2189-a of the former Penal Law. While the Court of Appeals has not written upon this issue, the People respectfully submit that this Court rejected the very issues raised herein (see *People v. McCraw*, 33 A.D. 2d 577). An examination of the briefs in the *McCraw* appeal indicates without question that the issues raised herein were also before this Court.

This Court in *People v. McCraw, supra*, found that the other contentions raised therein to be without merit. We interpret *McCraw, supra*, to mean that the sentencing procedure was considered by this Court to be constitutional. We see no other interpretation of the Court's opinion. We have not undertaken a massive review herein of the appellant's authorities for the same authorities were used in the *McCraw* briefs and we believe that their arguments were clearly rejected by this Court.

Respondent is unaware of any authority which supports appellant's view that persons in similar circumstances as the appellant, Hollis, are being treated in an unequal

manner. The authorities submitted by the appellant involving the equal protection issue are all authorities where alternate or different provisions are applicable to persons in similar circumstances. Obviously, such is not the case herein.

A recent lower Court decision (*People v. Zodda*, 61 Misc. 2d 345), Nassau County Court [1969] has interpreted *People v. McCraw* to have rejected the right to a jury trial at a hearing conducted pursuant to Section 2189-a of the former Penal Law.

CONCLUSION

The judgment of resentence should be affirmed.

Respectfully submitted,

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EXCERPT FROM DEFENDANT'S APPELLATE DIVISION
BRIEF IN PEOPLE V. HOWARD McCRAW

who have a diagnosis of paranoid schizophrenia or psychopathic personality and yet never commit any sort of violent crimes. One cannot infer from the diagnosis a prognosis as to a specific type of behavior. (178-179)

ARGUMENT

POINT ONE

THE PSYCHIATRIC REPORT SUBMITTED PURSUANT TO SECTION 2189-a OF THE PENAL LAW WAS INSUFFICIENT AS A MATTER OF LAW.

On June 18, 1968, pursuant to an order of the Nassau County Court dated June 5, 1968, the appellant was examined by H. Lawrence Sutton, M.D., and Henry Peckstein, M.D., qualified psychiatrists and pursuant thereto a report dated June 20, 1968 was forwarded to the court. This report, however, did not sufficiently discuss and analyze the defendant's sexual problem as of the time of resentencing nor did it offer any indication that any such condition of the appellant would be amenable to psychiatric treatment. Furthermore, it does not contain any allegation to the effect upon society of the appellant's immediate release with treatment on an outpatient basis. For these reasons the appellant contends that the psychiatric report was inadequate and did not meet the requirements as set forth under Section 2189-a of the Penal Law. People v. Kearse, 28 A.D. 2d 910 (2nd Dept. 1967), People v. Jackson, 20 A.D. 2d 170 (3rd Dept. 1963).

In determining whether an indeterminate one day to life sentence is appropriate, reference must be made to the

legislative intent in enacting such a method of treating certain offenders.

The amending and implementing statute (L. 1950, ch. 525) was entitled "An act to amend the mental hygiene law, the correction law, the penal law and the code of criminal procedure, in relation to the sentence, study, diagnosis and treatment of persons convicted of certain crimes." As the title of the statute suggests, its prime purpose was to bring about a system of mandatory psychiatric treatment for persons convicted of certain crimes who appeared, upon the basis of a psychiatric examination at the time of sentencing, to have a reasonable chance of improvement by virtue of continued treatment so as to eventually be released when sufficient improvement was shown. It cannot be denied, however, that the legislature was aware of the fact that a certain proportion of such offenders would not yield to treatment of any sort, and as a result, might very well spend the duration of their natural lives in custody.

Appellant contends, however, that where a report indicates that a defendant will not benefit from psychiatric treatment, there must be a very clear, fully evaluated and clearly explained report by the examining psychiatrists as to the manner and form in which the defendant presents a risk to society. (People v. Jackson, supra at 172)

In the instant case, the following portion of the psychiatrist's report is the only indication of defendant's potential danger to society:

"The examiners have reviewed the history as mentioned previously, and believe that many of this man's problems have to do with sexual conflicts. He has repeatedly, from the past record, been apprehended for charges of rape toward minors. The examiners believe that his mental illness shows itself in psychopathic behavior with sexual overtones and that he is potentially and continuously dangerous to minors in a sexual way."

Aside from the fact that the statement as to repeated charges of rape toward minors is not borne out by the record, such a report would certainly not seem to present the type of information which would enable the court, according to the dictate of Jackson, supra at 174, to

"determine whether defendant presents a probable behavior pattern which would render it dangerous to release him now; and if it does, whether such behavior problem can be favorably affected by custodial medical treatment."

On the contrary, the psychiatric report in the present case specifically states that the "defendant is a recidivist and can offer no hope for improvement with any form of known treatment since much of this has been tried in the past." Since the indeterminate sentence was instituted primarily to be predicated on an expectation of improvement by treatment (People v. Jackson, supra), it is obvious that the only basis upon which the sentence in the instant case can be upheld is if the report clearly indicates that the defendant presents such a danger to society as to make it unsafe to release him.

The mere fact that the examining psychiatrists believe that the defendant, if released, would be attracted to young females should certainly not be the type of prognosis which would justify the imposition of the one day to life sentence. This is so particularly in view of the fact that Dr. Peckstein, by his testimony, specifically negated any allegation that force or violence would be used in connection with any such sexual relationship (Minutes of Hearing, 46). Dr. Sutton, the other witness for the People, indicated that, if the defendant were released, he might use alcoholic beverages or other intoxicants and that this would reduce his tolerance to frustration, and if he were frustrated, he might seek to satisfy his impulses and the possibility existed that the frustration of these impulses might cause a reaction in a violent way (Minutes of Hearing, 130). However, neither witness was able to show that any violence was involved in the crime of 1952, which resulted in the indeterminate sentence, or on any of the three occasions upon which the defendant was returned to prison as a parole violator. It should be noted that the parole violation of 1956 involved the defendant wandering through a backyard in Brooklyn in an intoxicated condition and yet there is no indication that he was either violent or assaultive (Minutes of Hearing, 132). Similarly, Dr. Glen Swogger, the expert witness for the defendant, specifically stated that on the basis of all the information available, the defendant in no way presented a threat to the community

in terms of any propensity to commit violent sexual attacks on women (Minutes of Hearing, 168). It should be noted that Dr. Swogger was the only witness who consulted all the information available (Minutes of Hearing, 149-50).

The language of People v. Jackson, supra at 174, is of great importance with respect to this point. It there states that an examination should be conducted to determine whether the defendant presents a probable [emphasis supplied] behavior pattern which would render it dangerous to release him at the present time. Certainly, mere possibilities or conjectures should not be deemed sufficient to warrant the incarceration of the defendant for the duration of his natural life. Simply because the examining physician's regard an attraction of a twenty-one or twenty-seven year old man to a fifteen year old girl, "no matter what enticement she may have offered" as a sexual deviation, the court should not conclude that such a person is a menace to society within the meaning of Section 2189-a of the Penal Law.

The psychiatric report in the instant case does not substantially differ from the reports submitted in Jackson and Kearse, nor even in the earlier case of People v. McCraw, 21 N.Y. 2d 588.¹ It reiterated the fact that defendant's attitude was inappropriate to the circumstances, that he was suffering from a chronic form of pseudo-psychopathic schizophrenia with paranoid features but that he was capable of understanding the charges against him. As regards his sexual

¹ Report of October 15, 1966. See minutes of Re-sentence, January 27, 1967.

problem, it is apparent that the report of the psychiatrists is based solely on the fact that the defendant twice pled guilty to charges involving minor females, without regard to the facts and circumstances of each case.

With regard to the 1952 offense, for which he received the indeterminate sentence, a reading of the probation report as well as various portions of other statements made by the defendant, doctors and the complainant's father makes it clear that this was a consensual relationship which did not culminate in an act of intercourse. It appears uncontrovertible that when the female involved indicated she did not wish to proceed, she was freely allowed to leave by the defendant. In the 1946 incident, which Dr. Peckstein described in his testimony as involving five rapings of a young girl after which she required hospitalization, the records are unclear, as Dr. Swogger stated (Minutes of Hearing, 160, 161), as to whether the injuries resulted from a sexual relationship or from an assault after a quarrel. There is some evidence to the effect that the appellant and the complainant in that case were dating for some time and only after a quarrel was a rape charge filed against him. (Report of Dr. Meaks, attached to Probation Report of 1952). The very fact that there is such a lack of clarity in the record serves to bolster the appellant's contention that there were insufficient grounds for the court to find that the defendant presents a probable behavior pattern which would render his release dangerous to the public.

POINT TWO

THE SENTENCING PROCEDURE IN THE COURT
BELOW WAS UNCONSTITUTIONAL.

The appellant contends that the imposition of an indeterminate sentence of from one day to life was unconstitutional in that he was entitled to a trial by jury on the question of whether he was capable of benefitting from the confinement envisaged under the statutory scheme of Section 2189a, Penal Law, or was a danger to society. He also contends that the procedures prescribed for the psychiatric examination violated his privilege against self-incrimination as well as his right to have an attorney present during each and every stage of the criminal proceeding and that proof of his being capable of benefitting from confinement or of his being a danger to society should have been shown beyond a reasonable doubt and not merely by a preponderance of the evidence.

A. The appellant was entitled to a trial by jury on the question of whether he was capable of benefitting from confinement or if he was a danger to society.

Only if it is found that a person is a danger to society or is capable of being benefitted by the confinement envisaged by Section 2189-a of the Penal Law may be sentenced to serve an indeterminate term of from one day to the duration of his natural life. People v. Jackson, 20 A.D. 2d 170, 174 (3rd Dept. 1963); 21 A.D. 2d 843 (3rd Dept., 1964); People v.

McCraw, 21 N.Y. 2d 588, 594. It seems clear that the primary purpose of the legislature in adopting Section 2189-a of the Penal Law was to provide a method of rehabilitating sex offenders so as to enable them to return safely to society. Where, however, it was determined that psychiatric treatment during the term of the defendant's confinement would not appear to be beneficial, then the one day to life sentence might be imposed, not because life imprisonment was believed a just treatment but because no other reasonably safe alternative could be found. (People v. Jackson, supra at 172-173)

In a recent and as yet unpublished New York Court of Appeals decision, People v. Fuller, ___ N.Y. 2d ___, [Docket Nos. 438-441, 484 (N.Y. Ct. App. April 11, 1969)], the Court held that the failure to accord a convicted narcotics addict a jury trial on the issue of his addiction violates the equal protection clause of the Fourteenth Amendment. It is interesting to note that this right to a trial by jury was held not to be mandated under due process, since there was no showing that the detention compelled under §207 of the Mental Hygiene Law is in effect punitive punishment-but, rather, is intended solely for the addict's benefit. Because a jury trial on the issue of addiction is mandated for the civil commitment of narcotics addicts, however, a trial by jury was also required where the commitment was criminal in nature.

One cannot help but draw the obvious analogy between the above-mentioned case and the case at bar. Section 74 of the Mental Hygiene Law provides that where a patient desires to controvert a Court authorized commitment to a mental institution based upon the certificate of two examining physicians, he may petition a justice of the supreme court, other than the judge or justice presiding over the court making such order of commitment,

"who shall cause a jury to be summoned as in the case of proceedings for the appointment of committee for a mentally ill person where the question of fact arising upon the competency of the person is tried by a jury, and shall try the question of the mental illness of the person so authorized to be retained, in the same manner as provided in said proceedings."

In Baxtrom v. Herold, 383 U.S. 107, the United States Supreme Court held Section 384 of the New York Correction Law unconstitutional on equal protection grounds because it afforded a jury trial to all persons civilly committed as mentally ill, but not to those who had been hospitalized pursuant to a criminal commitment and whose sentences were expiring. Following the dictate of Baxtrom, the New York Court of Appeals has held that a person acquitted of a crime by reason of insanity is entitled to a jury trial on the question of whether his own protection or the protection of society requires his continued detention. (People v. Lally, 19 N.Y. 2d 27).

In a recently decided case, reported in the New York Law Journal of Friday, April 25, 1969, Volume 161 No. 81 at page 1, the United States Court of Appeals for the Second Circuit held that before a prisoner may be transferred to a state institution for insane criminals, he must be afforded the same procedural safeguards as provided in civil commitments, including a trial by jury. In so ruling, the Court drew an analogy to People v. Fuller, supra, stating that they "could see no logic or reason for distinguishing Schuster's plight from Fuller's." The opinion further stressed the fact that "all distinctions between civilian and prisoner patients must be swept aside."

The appellant therefore contends that he should be afforded the benefit of the equal protection clause of the Fourteenth Amendment and, as such, be entitled to a trial by jury on the question of whether he is capable of benefitting from confinement or is a danger to society.

Aside from the equal protection argument, the appellant was entitled to a jury trial of the aforementioned issue as a matter of due process. Appellant does not contend that a jury trial is required as a matter of due process in every instance where the outcome may result in a deprivation of liberty. As was stated in People v. Fuller, supra at 5, "(i)t is only those curtailments of liberty which serve the traditional purposes of criminal law which require the full protection of a criminal trial."

Footnote 3 at page 6 of Fuller is a most persuasive argument in behalf of appellant's position. In response to a contention by the People that the commitment of narcotics addicts was analagous to the one day to life sentence and did not require the application of all the constitutional guarantees applicable to criminal proceedings, the Court, in finding such guarantees not applicable, drew a sharp line of distinction between the commitment of an addict to the custody of the Narcotics Control Commission and the imposition of a one day to life sentence under Section 2189-a of the Penal Law:

3. The People contend that this is an independent sentencing proceeding similar to the one day to life sex offender statutes (Specht v. Patterson, 386 U.S. 605; People v. Bailey, 21 N.Y. 2d 588; United States ex rel. Gerchman v. Maroney, supra) and that Specht only requires the right to counsel, the right to confront witnesses and the right to present evidence. Although the issue has not been specifically decided, there are strong indications that, because of the possible additional period of deprivation of freedom involved, a higher burden of proof may be required [Specht v. Patterson, supra, 386 U.S. at 608; see, also, United States ex rel. Gerchman v. Maroney, supra, F. 2d at pp. 309-310 (D.C. Cir.)]. No doubt one goal of these statutes is to give a defendant special psychiatric help, but another principal purpose of the statute is to keep persons who are considered likely recidivists and dangerous to others in jail for an extended period. This is a normal attribute of criminal sentencing procedure, and all the protections of criminal proceedings, including the privilege against self-incrimination, access to counsel at all times, proof beyond a reasonable doubt and the right to a jury trial, may well apply.

See, also, People v. Michael O. (Anonymous) 22 N.Y. 2d 831.

A consideration of the pertinent facts in the instant case can leave no doubt but that the appellant's incarceration is serving no purpose other than the traditional punishment normally attributed to criminal sentencing. As early as April 7, 1954, Dr. Bernard Glueck, Jr., the supervising psychiatrist at Sing Sing State Prison diagnosed the appellant as suffering from schizophrenic psychosis and stated that it would appear that he must continue his incarceration over a long period of time, primarily for the protection of society.

In People v. Jackson, supra at 173, the Court took note of the fact that during the eleven (11) year period of the defendant's incarceration, he received no psychiatric treatment and that reports of examination made of him in prison show entirely superficial judgments. The following is a capsule synopsis of various reports of psychiatrists made during the appellant's incarceration which indicate not only that no psychiatric treatment has been rendered, but also that no psychiatric treatment was even recommended:

June 4, 1955. Dr. Joseph Schechtman,
Sing Sing: "I do not feel
that he is a candidate for any
psychotherapeutic procedure
other than a type of reassurance."

January 12, 1956, Dr. Harold Grushkin,
Sing Sing: "I believe the sub-
ject is in sufficient contact
with reality so as to curb his
promiscuous tendencies toward
minors for the sake of avoiding
further confinement, if for no
other reason I believe his chances
of succeeding at it are favorable."

June 12, 1956, Dr. Harold Grushkin,
Sing Sing: "I am inclined to
feel that the prognosis favors
his not repeating the instant
offense."

May 24, 1961, Dr. Harry L. Freedman,
Clinton Prison: "The patient
evidences no psychosis nor
symptoms requiring psychiatric
treatment."

April 24, 1961, Dr. Harry L. Freedman,
Clinton Prison: "No psychosis
at this time."

October 31, 1961, Dr. Harry L. Freedman,
Clinton Prison: "No psychosis."

August 26, 1961 - Drs. Brown and Freedman,
Clinton Prison: "No psychosis nor
symptoms requiring psychiatric treat-
ment."

March 30, 1962 - Drs. Brown and Freedman,
Clinton Prison: "He evidences no
psychosis nor symptoms requiring
psychiatric treatment at this time."

January 11, 1963, Dr. James Brown, Clinton
Prison: "Ex-psychotic. Shows no
psychiatric symptoms at present."

November 14, 1963, Dr. Louis Huzella,
Clinton Prison: "Condition not
changed since last psychiatric inter-
view in June, 1963. He is not psycho-
tic and requires no psychiatric care."

February 6, 1964, Dr. Louis Huzella,
Clinton Prison: "Inmate is not psychotic
and requires no treatment."

March 19, 1964, Dr. Louis Huzella, Clinton
Prison: "Psychopath showing no manifesta-
tions at this time and he requires no
psychiatric care or treatment."

May 4, 1964, Dr. Louis Huzella, Clinton
Prison: "Not psychotic and needs no
treatment."

August 10, 1964, Dr. Louis Huzella,
Clinton Prison: "Inmate requires
no treatment at this time - he is
not psychotic."

November 5, 1964, Dr. Louis Huzella,
Clinton Prison: "Inmate not psychotic
and needs no psychiatric treatment."

January 30, 1965, Drs. Amore Del Guidice
and Harry L. Freedman, Clinton Prison:
"Evidences no psychosis nor symptoms
requiring psychiatric treatment at this
time."

The foregoing excerpts from the psychiatric reports of various doctors, coupled with the report of Drs. Sutton and Peckstein of June 20, 1968 in which it was stated that the "examiners believe he is a recidivist and can offer no hope for improvement with any form of known treatment since much of this has been tried in the past" clearly indicates that the appellant was not being held for the purpose of rehabilitation, but rather was serving a prison sentence far in excess of that provided by law on the pretense of his being a threat to society. More specifically, appellant has been confined for some seventeen (17) years upon his plea of guilty to assault in the second degree with intent to commit rape, a crime for which a maximum sentence of five (5) years is prescribed. Assuming ~~quendo~~ ^{quendo} that he was afforded all the required constitutional safeguards in 1946, when he pled guilty in South Carolina to a crime which may have been a felony in New York, he still should have been sentenced to a minimum of two and one-half (2-1/2) and a maximum of ten (10) years under Section 1941 of the Penal Law.

The language of United States ex rel. Gerchman v. Maroney, 355 F. 2d 302, 309 (3rd Cir., 1966) makes it abundantly clear that the appellant's incarceration serves the traditional purposes of criminal sentencing and can in no way be regarded as a purely rehabilitative commitment designed for the benefit of the defendant. In speaking of the Barr-Walker Act, which provided for the commitment of convicted sex offenders for a term of from one day to life if it was shown that the defendant would "if at large constitute a threat of bodily harm to members of the public, or is an habitual offender and mentally ill," the Court noted that there was no doubt that the statute is criminal in nature and that what is imposed under its authority is criminal punishment. The fact that the Act provides for periodic psychiatric and psychological examinations which the Board of Parole is to review makes it no less the inflection of criminal punishment, especially when this is accompanied by the drastic potential of life imprisonment if the examinations do not affirmatively provide a basis for release. Furthermore, the criminal punishment does not lose its characteristic because the Act goes beyond simple retribution.

"It would be archaic to limit the definition of punishment' [under the Bill of Attainder Clause] to 'retribution.' Punishment serves several purposes; retributive, rehabilitative, deterrent - and preventive. One of

the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any less punishment." United States v. Brown, 381 U.S. 437, 458; 85 S. Ct. 1707, 1720, 14 L. Ed. 2d 484 (1965). See, also, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963); Case Comment, 32 U. Chic. L. Rev. 290, 294-298 (1965). (id)

Thus, the plight of the appellant in the instant case would certainly appear to be an attribute of criminal sentencing procedure and thus, within the language of Fuller. Therefore, the appellant should have been afforded a trial by jury as a matter of due process.

B. The sentencing procedure under Section 2189a of the Penal Law violated appellant's privilege against self-incrimination, his right to have the advice of counsel at all stages of the criminal proceeding and his right to have guilt proved beyond a reasonable doubt.

The imposition of an indeterminate sentence of from one day to life, unlike the commitment of narcotics addicts (People v. Fuller, supra) is an enlarged punishment for an essentially independent criminal offense. This is so because when the Court determines that a person is a danger to society or can benefit from extended incarceration, it is making a new factual finding which goes substantially beyond the finding of guilt of the underlying crime. Cf. People v. Michael O. [Anonymous] supra. It is this new finding which authorizes and requires the imposition of a sentence of from one day to life instead of the maximum provided by statute

for the underlying crime in the absence of such a finding.

(People ex rel. Gerchman v. Maroney, supra at 311). The imposition of an indeterminate sentence, being essentially based upon an independent criminal finding, a defendant should be protected by the full panoply of constitutional rights and privileges if they are made applicable to the states by virtue of the Fourteenth Amendment.

Since the decision of the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436, it cannot be disputed that the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to the assistance of counsel are applicable whenever a person in custody is to be subjected to interrogation. While the Miranda decision dealt specifically with custodial police interrogation, as was stated in People v. Fuller, supra at 5, "(i)t is the reality that counts, not the metaphysical distinctions of the legal mind." The reality of the appellant's situation is that he had been confined in various penal institutions for some sixteen (16) years when he was interviewed by Drs. Peckstein and Sutton. During the course of those many years he had had periodic interviews with psychiatrists too numerous to mention. There is no reason why the appellant should be expected to attach more significance to this examination than any of the others which he had undergone. Nor could he realize that it would be these psychiatrists who, in their capacity as witnesses for the prosecution,

would testify as to their impression of the appellant based upon their examination of him and whose testimony would serve as the basis for the reimposition of the indeterminate one day to life sentence.

Of great significance in this regard is a decision of a United States Army Board of Review in United States v. Hamlin, ___ U.S. Army Bd. Rev. ___; 4 Crim. Law. Rep. 2170, in which the Miranda warnings were held applicable to a government psychiatrist. Quite reasonably, the determination of whether the warnings were required was there said to depend upon the extent to which the doctor was working for the prosecution. Since the officer-psychiatrist had examined the defendant in a stockade and later testified for the prosecution at trial and was well aware of the criminal investigatory context and motivation of his examination, the Miranda warnings were held to be required. The instant case clearly parallels the situation in Hamlin. The examining psychiatrists examined the appellant while he was in custody; they were fully aware of the criminal sanction which could be imposed as a result of their diagnosis and they testified as witnesses on behalf of the prosecution at the psychiatric hearing. There can be no doubt that this is the type of situation which the very essence of the Miranda decision sought to remedy. Thus, the appellant should not have been required to make any statements to the examining physicians and should have been afforded the opportunity of having an attorney present during such examination.

In view of the fact that, as has previously been shown, the sentencing procedure under Section 2189a constituted an essentially separate finding for which criminal punishment was imposed (Specht v. Patterson, 386 U.S. 605, United States ex rel. Gerchman v. Maroney, supra; People v. Fuller, supra), the due process clause of the Fifth and Fourteenth Amendments was fully applicable. (Specht v. Patterson, supra at 608). As was stated by Mr. Justice Frankfurter, joined by Mr. Justice Black in a dissenting opinion in Leland v. Oregon, 343 U.S. 790, 802-802:

"It is the duty of the Government to establish his guilt beyond a reasonable doubt. This notion-basic in our law and rightly one of the boasts of a free society - is a requirement and safeguard of due process of law in the historic procedural content of "due process."

Clearly, therefore, the burden of proof was upon the People to prove, beyond a reasonable doubt, that the appellant was a danger to society or was amenable to psychiatric treatment which would be provided under the statutory schema of Section 2189a of the Penal Law.

POINT THREE

THE COUNTY COURT JUDGE WHO HAD EARLIER DETERMINED THAT THE INDETERMINATE SENTENCE UNDER SECTION 2189a OF THE PENAL LAW WAS APPROPRIATE SHOULD NOT HAVE PRESIDED OVER THE HEARING UPON REMAND.

At the outset of the psychiatric hearing, held on October 1, 1968, counsel for the defendant requested that the

EXCERPT FROM DISTRICT ATTORNEY'S APPELLATE
DIVISION BRIEF IN PEOPLE v. HOWARD McCRAW

3

People are represented by the Honorable William District Attorney of Nassau County (Assistant District Attorneys Frank Dillon on the Hearing and Jules Stein on this Appeal).

llant is represented by Mr. McDonough's Office w Muraskin and Daniel Dillon, Esqs., of Counsel).

Issues

llant firstly contends that the psychiatric report d on this matter was insufficient as a matter of

urther contends that the sentencing procedure was tutional in that the defendant should have had a l on the question, and that the procedures utilized ourse of the psychiatric examination violated his nder the Fifth Amendment and the Sixth Amend- privilege against self-incrimination and the right to awyer present during the examinations). He also in this vein, that the standard of proof should n beyond a reasonable doubt and not merely upon rance of the evidence.

llant further claims that Judge Oppido should not sided at the hearing, since he had previously re- the defendant to the one day to life term.

sly contends that the one day to life sentence pro- not been successful.

The Psychiatric Hearing

Henry Pechstein (pp. 11 *et seq.*),* a practicing ist and an attending psychiatrist at the Meadow-

ences herein are to page numbers of the transcript of Psychiatric Hearing.

chotic, but it was possible at that time that there was no symptomatic psychotic behaviour (pp. 164-165).

Most importantly, Dr. Swogger testified that in terms of the defendant's propensity to be involved with women sexually, the defendant would be a threat to the community (p. 168).

The witness, stating he was a pessimist, believed there could not be an expectation for improvement by keeping the defendant in prison and by giving him treatment now available (pp. 168-169).

However, Dr. Swogger again indicated that if the defendant were released there would be expected further episodes of drunkenness and disorderliness and the possibility that the defendant would try to have relations with young females (pp. 170-171).

The doctor therefore agreed with the other psychiatrists that the defendant would manifest his behaviour toward females, but that there would be no violence involved with this (pp. 171-173).

Dr. Swogger agreed that there was a likelihood of recurrence of sexual behaviour on the part of the defendant if he were released (pp. 173, 182), and that psychiatric treatment could not be expected to guarantee any marked change in his prediction (p. 182).

POINT I

The psychiatric report as augmented by the Hearing, pursuant to Section 2139-a of the former Penal Law and *People v. Bailey*, sufficient as a matter of law. (In answer to Appellant's Brief, Point I.)

Annexed hereto as an appendix, is a copy of the psychiatric report submitted to the court in connection with this matter.

It is respectfully submitted that a perusal of this report will indicate that it is sufficient within the meaning of *People v. Bailey*, 21 N.Y.2d 588 and cases cited therein.

This report states, in part, "The examiners have reviewed the history as mentioned previously, and believe that many of this man's problems have to do with sexual conflicts. He has repeatedly, from the past record, been apprehended for charges of rape toward minors. The examiners believe that his mental illness shows itself in psychopathic behaviour with sexual overtones and he is potentially and continuously dangerous especially to minors in a sexual way."

Moreover, a review of the highly technical testimony given by the prosecution's witnesses at the hearing below further explained the nature of the defendant's sexual difficulties. Specifically, Dr. Pechstein believed that once appellant was out of a controlled environment, he would act out his impulses and when weakened by the use of alcohol or drugs, the defendant would lose control and in essence revert to his prior pattern of behaviour with respect to minor girls.

This was tied in with the doctor's diagnosis indicating defendant was somewhat out of touch with reality and further evidenced by the defendant's brutal assaultive rape of a 15 year old girl in 1946; another rape of a 15 year old girl in September 1952, the victim being the daughter of the woman with whom defendant was staying; as well as the crime for which defendant was convicted in Nassau County.

Dr. Sutton, more or less agreed with the diagnosis and analysis of Dr. Pechstein.

Even the defendant's own witness Dr. Swogger agreed that there appeared a pattern of sex behaviour with young women, which conduct could be expected to occur in the future.

So too, this witness after reviewing the defendant's past history concluded that the defendant had a propensity to be involved with women sexually and would be a threat to the community since it would be expected, that if released, defendant would go through further episodes of drunkenness, disorderliness, following which the defendant would try to have relations with young females.

With respect to the issue of rehabilitative treatment, the People's psychiatrists were of the opinion that outpatient treatment would be of no avail if defendant were released and that whatever treatment could be afforded within a controlled environment would be best for society and the defendant, since in such an environment defendant would be unable to act out his sexual propensities and impulses. The latter, of course, was an optimistic view taken by the doctors.

On the other hand, Dr. Swogger stated that any type of treatment within the confines of a controlled institution would not benefit the defendant although it might stabilize him in a prison atmosphere. A fair reading of this doctor's testimony would also indicate that he did not believe treatment on the outside would be of benefit in connection with the defendant's problem.

Hence, after reviewing the testimony of the three experts, including the report submitted by the People's experts, it is respectfully submitted that the report, by itself, was sufficient as a matter of law.

But, assuming arguendo, that it failed in some slight respect, it is further submitted that the hearing developed facts which heavily augmented and amplified the official report.

This, the People would liken to a bill of particulars amplifying and expanding upon the initial pleadings in a matter and would respectfully suggest to this Court that the report be considered together with the evidence ad-

need at the psychiatric hearing in circumstances such as these.

Prior to the advent of *People v. Bailey, supra*, where hearings on this type of issue were not mandated, case law properly required an adequate report since it was the report which normally gave to the sentencing judge the basis for which he could exercise his discretion in imposing the one year to life sentence.

Now of course with hearings mandated in this area, there does not seem to be any logical or rational basis for viewing the report in a vacuum and segregating it from the evidence adduced at the psychiatric hearing.

In short, since it appears that the statutory purpose, as amplified by previous case law (*People v. Jackson*, 20 A.D.2d 170, 21 A.D.2d 843; *People ex rel. Lawson v. Denno*, 9 N.Y.2d 181; *People v. Kearse*, 28 A.D.2d 910) was to assure that a sentencing judge had a sufficient basis to intelligently impose the one day to life sentence (keeping in mind that all a judge could utilize prior to *People v. Bailey, supra*, was a report) it is respectfully suggested that a more enlightened view be taken in a situation where a psychiatric hearing is held and that the report and the testimony of the psychiatrists be read together and evaluated in harmony with the statutory scheme and purpose.

The People will not enumerate extracts of the various psychiatrists' findings, as appellant has done at pp. 22-24 of his brief, since the same have basically been recapitulated in Dr. Sutton's testimony. The People will point out however that these records, which are purportedly under subpoena to this court, clearly indicate a lengthy history of psychiatric examination and treatment, including two psychotic episodes, the last of which required an approximate three year confinement at Dannemora Hospital.

Appellant further contends that the reality of his situation is that he has been confined in various penal insti-

tutions for some 17 years. The realistic answer to this is that when he was released on parole, there was no way of knowing whether he did revert to his former behaviour patterns other than that which was reported in the Department of Correction records.

Moreover, it seems defendant did get into trouble each time he was released on parole and his parole was violated.

The People do not read *People v. Bailey, supra*, as requiring a finding that the defendant would commit violence if released.

Based on the foregoing, it is respectfully submitted that the psychiatric report and amplifying evidence adduced at the hearing was sufficient as a matter of law to permit the sentencing judge to reimpose the one day to life sentence.

POINT II

The sentencing procedure in the Court below was constitutional. (In answer to Appellant's Brief, Point II.)

Appellant urges that his constitutional rights were violated at the proceedings below because he did not have a trial by jury on the issue. He further claims that his rights under the Fifth and Sixth Amendments were violated, in that he was not given Miranda warnings by the psychiatrists and that he should have had a lawyer present while he was being psychiatrically examined. He also alleges that the burden of proof upon the People at the hearing should have been beyond a reasonable doubt.

It should first be understood that the appellant at no time requested a jury trial on the issue nor did he request that his lawyer be present at the psychiatric examination.

A reading of the history of this case clearly shows that the defense was well aware that a hearing was

held and a new examination was to be performed. Indeed, the counsel's office represented the appellant in the Court of Appeals in *People v. Bailey, Leison and Crow, supra*, and represented the appellant during the proceedings below.

Verily, counsel's efforts in the Court of Appeals successfully challenged the efficacy of the original psychiatric report as well as the procedures and it can be said that these efforts he was requesting a new examination and report as well as a hearing.

Appellant cites a number of authorities dealing with the right to jury trials in areas distinguishable from the instant situation (i.e., *Bartrom v. Herold*, 383 U.S. 107; *People v. Lally*, 196 N.Y. 2d 27 (insanity); *People v. Fuller*, N.Y. 2d 292 (narcotic addiction certification) to support arguments in favor of a jury trial.

The cases dealt with the equal protection provision of the Fourteenth Amendment. In each case, there were no law counterparts of the criminal proceedings which denied jury trials to the non-criminal defendants. The court concluded it was a denial of equal protection of the law to withhold a jury trial from the defendants in a criminal case.

Appellant also seeks to take advantage of *Specht v. Patterson*, 386 U.S. 605 and *United States ex rel. Gerchman Maroney*, 355 F.2d 302 to support his argument that appellant was entitled to his Fifth and Sixth Amendment rights as well as a right to a jury trial.

Interestingly, *Gerchman, supra*, preceded *Specht, supra*, and in both cases a jury trial was not mandated by the respective courts even though certain minimum standards of due process were set forth by those respective courts.

In speaking of these rights, *Specht, supra*, set forth that at the psychiatric hearing, due process required that

the defendant be present with counsel, have an opportunity to be heard, or confronted with witnesses against him, have the right to cross-examine and to offer evidence in his own behalf (*Specht, supra*, at p. 610).

Specht, supra, recognized that the one day to life proceedings was not the ordinary type of sentence proceeding where no hearing and the like was required. The court adhered to *Williams v. New York*, 337 U.S. 241, but held it would not extend the *Williams* rationale to this radically different situation and thereupon set forth the minimum standards of due process by directing a hearing.

Appellant's contentions regarding what he claims were violations of his rights below, in essence, would destroy the efficacy of this state's one day to life proceedings.

Thus, if a defendant had a right not to answer the psychiatrists' questions and had the further right to have a lawyer present who might very well prevent him from answering questions, there could conceivably be a situation where the psychiatrist would be unable to report to the court because of this obstructionism.

It is respectfully submitted that even though *Specht, supra*, did not wish to abide by *Williams, supra*, because of the hybrid nature of the one day to life proceeding, the court only did so in order to afford minimal standards of due process in the form of a hearing and an opportunity to be heard. However, *Specht* still recognized the efficacy of *Williams, supra*.

Williams, supra, recognized the necessity of not confining a sentencing judge to the narrow issue of guilt and set forth the great importance of permitting a judge to come into possession of the fullest information possible concerning a defendant's life characteristics and the like in order to arrive at the type and extent of punishment. *Williams* also made it clear that a sentencing judge should not be denied an opportunity to obtain pertinent informa-

by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial. *Williams*, at p. 247.

Thus, while a hearing mandated by *Specht* and *Bailey* did to result in a new finding of fact, the one day to life proceeding still retains certain aspects of the traditional relating to sentence and punishment with respect to discretion of the sentencing judge who, under *Williams*, have access to a current psychiatric report.

In *People v. Di Piazza*, 24 N.Y.2d 342, a similar contention was raised by the defendant there with respect to the and Sixth Amendment rights.

Here, at the trial, there was an issue of defendant's at the time of the commission of the crime and the on rebuttal adduced the testimony of psychiatrists the defendant's psychiatrists had testified.

In answer to *Di Piazza's* contentions, the Court of Appeals firstly ruled that the defendant's failure to object at trial precluded him from complaining. In addition, the court indicated that the testimony of the People's experts contained nothing that was really incriminating. Further, the court pointed out that the defendant himself had requested the mental examination and his counsel could not have been unaware of what the examination would cover. *People v. DiPiazza, supra*, at p. 352.

The court, there, also indicated at p. 353, that it was not common sense to permit a defendant to invoke the issue of insanity and foreclose the prosecution from the right of a mental examination to meet the issue. *People v. DiPiazza, supra*.

In our instant case, as previously indicated, no objection was raised by counsel to the absence of a jury trial, the absence of counsel at the psychiatric examination or the failure to give the defendant Miranda warnings prior to the examination.

Moreover, it does not appear that the defendant made any incriminating statements in the normal and traditional sense and, in fact, for the most part, even denied his past criminal conduct when asked about it. So too, counsel here had to be aware of the nature of the examination and can be deemed to have requested it by virtue of its appellate argument in the Court of Appeals seeking a hearing and a new examination.

In *People v. Fuller, supra*, the Court of Appeals concluded that since the Narcotic Addiction Control Act was rehabilitative in nature, the normal Fifth and Sixth Amendment rights and the degree of proof required would not be the normal criminal standards of proof.

In this connection, a review of both *Specht, supra* and *Bailey, supra*, clearly indicates that part of the New York statutory scheme in the one day to life area is rehabilitative in nature and it is difficult for the People to see how the rehabilitative purposes vis-a-vis the penal purposes of the statute can be separated so as to require Fifth and Sixth Amendment rights during the course of a psychiatric examination for one of these purposes and not the other.

As was pointed out in *Fuller, supra*, the medical examinations there were used solely for diagnostic purposes and the People submit that the psychiatric examinations here were used for the same purpose and within the spirit of *Williams v. New York, supra*.

Returning to the issue of whether or not the jury trial should be ordered in this one day to life proceedings, the court's attention is directed to *Duncan v. Louisiana*, 391 U.S. 145, wherein that court indicated: "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury". *Duncan, supra*, at p. 158.

The People respectfully submit in this connection that a close analysis of *Duncan, supra*, will clearly reveal that

court there was speaking only in terms of the guilt finding process and not the sentencing process and the People would accordingly urge that *Duncan, supra*, in no way envisaged, as a matter of due process, that there be day trials in our one day to life proceedings.

Indeed, it is difficult to see why there should be a jury trial in such proceedings where our Court of Appeals in *People v. Bailey, supra*, in effect, held that the sentencing judge would not be bound by the findings in a psychiatric report and could impose the one day to life sentence provided there was other evidence in the record to sustain a finding that the sentence conformed to one of the purposes of Section 2189-a.

In our instant case, there were such other records from the Department of Correction and the Probation Department indicating a history of the defendant's past sexual perversities.

Appellant cites *United States v. Hamlin*, 4 Crim. Law J. 2170, which held that the Miranda warnings were applicable to a Government psychiatrist who examined the defendant prior to trial and later testified at the trial.

The People respectfully submit that case is distinguishable from the instant case since there the testimony was relevant to the guilt finding process and the testimony of the psychiatrist actually went to whether or not the defendant was criminally responsible for the crime charged.

So too, in our instant case, Doctors Sutton and Pechman could not be said to be law enforcement officials or employees of law enforcement. They were appointed by the court to conduct psychiatric examinations, diagnostic purpose, and their report could have been favorable to the defendant or to the People, depending upon the circumstances.

Therefore, it is respectfully submitted that the rules of *Miranda* in this area would not apply.

In view of all the foregoing and in the absence of higher authority directly in point, it is respectfully submitted that the appellant's constitutional rights under the Fifth, Sixth and Fourteenth Amendments were not violated by the procedures utilized in the County Court below.

POINT III

County Court Judge properly presided at the hearing below. (In answer to Appellant's Brief, Point III.)

Appellant contends, without authority, that because Judge Oppido refused to disqualify himself from conducting the hearing below, appellant was therefore deprived of due process of law and equal protection of the laws.

The People respectfully submit that the proceeding here is no different than the normal type situation where an Appellate Court has remanded a matter to a lower court for further proceedings and the judge who had previously presided at the lower court is called upon to make a new adjudication.

This of course is the common sense approach especially where the Judge, such as Judge Oppido, in this case was fully familiar with almost the entire background and history of this case. There is nothing in this record, it is submitted, which would indicate that Judge Oppido was prejudiced or biased toward the defendant because of his previous finding on the first resentencing, prior to the advent of *People v. Bailey, supra*.

We are not here dealing with proceedings authorized by the Mental Hygiene Law or the Narcotic Addiction Control Act or the factual circumstances of a case such as *People v. Fuller, supra*, or the differences in treatment between civilian and criminal prisoners. Here, we are dealing with a proceeding which really has no direct counterpart on the civil side of the law.

RESPONDENT'S MEMORANDUM

There is no right to a jury trial in a sex offender sentencing hearing. The sentencing hearing follows the defendant's conviction by a jury of the specified sex crime, or, as here, it follows the defendant's knowing waiver of his right to that jury trial by plea of guilty. The sentencing hearing does not involve the kind of fundamental judgment of guilt or innocence which predicates the right to a jury trial. It involves no facts properly to be determined by triers of fact drawn from the community. Rather it involves an assessment of the expert medical opinions of psychiatrists, including most importantly their prediction of the convicted offender's future behavior both in society at large and in a treatment setting. That assessment, as with the many other assessments committed to the judge in any sentencing decision, lies properly with the judge rather than a jury. See Williams v. New York, 337 U.S. 241 (1949). Petitioner cites no case holding to the contrary.

Nor is there any right to a standard of proof beyond a reasonable doubt in a sentencing hearing. Guilt of the underlying sex offense has already been established by jury verdict under that standard, or by guilty plea. Once guilt has been established, and the defendant's liberty taken away,

the determination of his status as justifying indeterminate sentence and treatment is one more akin to a civil judgment, as in a parole revocation proceeding, Morrissey v. Brewer, 408 U.S. 471 (1972) or a proceeding to remove a prisoner's good-time credits, Wolff v. McDonnell, 418 U.S. 539 (1974). Petitioner's reliance on United States ex rel Stachuluk v. Coughlin, 520 F. 2d 931 (7 Cir. 1975), cert. denied _____ U.S. _____, 96 S. Ct. 1419 (1976) is altogether misplaced.

That case involved a statute which permitted institutional commitment in lieu of criminal prosecution. Id. at 933.

Thus the Court in that case required simply that the judgment by which the defendant passes from freedom to confinement be made by the standard of proof beyond a reasonable doubt. Since no prior judgment of guilt beyond a reasonable doubt of any underlying offense had preceded the commitment hearing, imposition of the higher standard was more justified. Here, however, where the defendant's liberty has already been taken away by such a prior judgment (or guilty plea), the higher standard is neither necessary nor appropriate. See Tippett v. State of Maryland, 436 F. 2d 1153, 1158-59 (4 Cir. 1971), cert. dismissed as improvidently granted sub. nom. Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972). Petitioner cites no federal cases holding the Constitution to require that

where a judgment of guilt beyond a reasonable doubt of an underlying offense has been reached, the sentencing hearing requires another judgment based on proof beyond a reasonable doubt. Further, the efficacy of the "beyond a reasonable doubt" standard to psychiatric testimony consisting of opinion and prediction is remote. In this area the "preponderance of the evidence" standard seems much more relevant, since the judgment involved is more like that in a civil matter.

Finally, petitioner had no right to remain silent or to have counsel present during his psychiatric examination. Those rights were not enumerated in Specht, though clearly incorporated in the Fourteenth Amendment's guarantee of liberty by them, see Miranda v. Arizona, 384 U.S. 436 (1966), and Justice Douglas' failure to include them among the protections required in Specht must indicate the Court's rejection of those rights in that context. Indeed, to give a defendant the right to remain silent and refuse to participate in the psychiatric examination would effectively end sex offender adjudicatory procedures throughout the country. No defendant would ever permit a psychiatrist to examine him, and the adjudicatory procedure could not function without the psychiatric evaluation which is the essential basis of the court's decision. To allow counsel to attend the examination and object to questioning

DAVID HOLLIS.

-against-

Respondent.

STATE OF NEW YORK)
:SS.:
COUNTY OF NEW YORK)

At the request of the Court, I have obtained an affidavit from the Honorable Paul Kelly, J.S.C., who as a County Court Judge in 1969 sentenced petitioner to his one-day-to-life indeterminate sentence. Justice Kelly's affidavit is annexed hereto.

Mark C. Rutzick
MARK C. RUTZICK

11/ Jan P. Scovell
Assistant Attorney General
of the State of New York

A-203

RECEIVED
JAN 14 1960

STATE OF NEW YORK
COUNTY OF NASSAU

} ss.:

PAUL KELLY, being duly sworn, deposes and says:

That I am a Justice of the Supreme Court of the State of New York.

That at the request of Mark Rutzick, Assistant Attorney General, I have made a search of the records concerning a Hearing I conducted as County Court Judge of Nassau County involving one DAVID HOLLIS. As a result of this investigation, I have determined that David Hollis had been sentenced, on the basis of his plea of Guilty to the crime of assault with intent to rape, to a sentence of one day to life, on December 8th, 1968; that this sentence had been set aside and Hollis was returned to Nassau County for the purpose of a Hearing pursuant to §2189-a of the former Penal Law. The Hearing was held before me commencing January 21st, 1969 and my decision that he was incapable of being returned to Society was based on the testimony of the two Psychiatrists presented by the People and the testimony of Hollis, himself. I unhesitatingly state that the standard of proof required by me in the conduct of this Hearing was on the basis of "Beyond a reasonable doubt".

That as a County Judge who handled nothing but criminal matters for some nine years preceding this Hearing and who, as an Attorney for twenty-five years, had specialized in Criminal Law, it would have been beyond my comprehension to have decided it on any other basis.

Sworn to before me this
7th day of January, 1977.

James Brucia

A-204

[Signature]

LEGAL AID SOCIETY OF NASSAU COUNTY, N.Y.

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February 7, 1977

James J. McDonough
Attorney in Charge

The Honorable Thomas C. Platt
Judge, United States District Court
Eastern District of New York
United States Court House
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Hollis v. Smith, 76 Civ. 1083

Dear Judge Platt:

I am writing in response to the affidavits I have received in connection with the above-entitled action. I have received an affidavit from Mr. Rutzick in which he states that he obtained an affidavit from Judge Kelly "at the request of the court", and the affidavit of Judge Kelly in which he states that he applied the standard of proof beyond a reasonable doubt at the petitioner's resentencing hearing. If I had known prior to this that the Court was making this request of the Attorney General's office, I would have strongly objected to this procedure. At this point I must object to the Court giving any consideration to Judge Kelly's affidavit since the issue of whether the beyond a reasonable doubt standard was applied at the petitioner's resentencing hearing is not properly open to question. Alternatively, it appears that Judge Kelly's affidavit should not be considered because it presents a legal opinion rather than factual information, it is inconsistent with material in the record, and it conflicts with prior and subsequent New York case law as well as the view expressed in the respondent's papers in this Court.

The arguments and authorities relevant to these points are somewhat lengthy and I have, therefore, discussed them in the enclosed memorandum of law. I have enclosed the briefs filed by both parties in connection with the petitioner's appeal to the Appellate Division, Second Department. I have also enclosed the Appellate Division briefs in the case of People v. Howard McCraw, since the District Attorney's brief in the petitioner's case makes reference to the briefs in that case arguing that the Appellate Division decision in

the McCraw case (33 A.D. 2d 577) was dispositive of the petitioner's claims. As the District Attorney's brief in the petitioner's case suggests, the defendant's brief in the McCraw case is virtually word-for-word identical to the petitioner's Appellate Division brief.

It is respectfully requested that the Court rule on whether the Kelly affidavit will be considered. If it is to be considered, then petitioner requests that an evidentiary hearing be held on the subject of the standard of proof that was applied at petitioner's resentencing hearing. A hearing would be required because substantial, disputed issues of fact in a habeas corpus proceeding may not be established by ex parte affidavits alone. Walker v. Johnston, 312 U.S. 275, 287 (1941); Wright v. Dickson, 336 F. 2d 878, 882-83 (9th Cir. 1964); Jones v. Cunningham, 313 F. 2d 347, 349 n. 4 (4th Cir.), cert. denied, 375 U.S. 832 (1963); United States v. Salerno, 290 F. 2d 105, 106 (2d Cir. 1961). However, for the reasons discussed in the accompanying memorandum, it is petitioner's contention that no hearing is necessary and that this case may be decided on the basis that the petitioner was denied the right to the proof beyond a reasonable doubt standard.

I think it may be helpful at this point to re-state the basic issue in this case. As I see it, the issue is whether the State can subject Mr. Hollis to a life sentence of criminal punishment in a maximum security penal institution on the basis of fact findings made in a proceeding that did not comport with the minimum constitutional requirements of due process in criminal proceedings. The claim that these constitutional requirements should have been followed in the petitioner's resentencing hearing is the claim that was summarily found to be "without merit" by the Appellate Division.

The issue in this case is not whether Mr. Hollis is, in fact, dangerous, or whether he should be confined. If the State believes that Mr. Hollis should be incarcerated, then alternative, civil procedures are available. New York Mental Hygiene Law, Article 31. If the State prevailed in this civil proceeding, then Mr. Hollis would be committed to a civil facility where he would have a right to care and treatment. N.Y. Const., Art. XVII §4; Mental Hygiene Law §§1.03, 15.03. Instead Mr. Hollis is incarcerated in Attica Prison where he receives no therapy and where he is, in fact, treated like any other inmate in an institution where the "promise of rehabilitation" is a "cruel joke". Attica; The Official Report of the New York State Special

February 1, 1977
Page 3

Commission on Attica 4 (1972). Claims of lack of any rehabilitative treatment have been raised repeatedly, and usually successfully, by Attica inmates serving one-day-to-life sentences. People ex rel. Hunker v. Smith, 47 A.D. 2d 585 (4th Dept. 1975); People ex rel. Chumley v. Mancusi, 26 A.D. 2d 905 (4th Dept. 1966); People ex rel. Kaganovitch v. Williams, 23 A.D. 2d 178 (4th Dept. 1975); People v. Hutchings, 74 Misc. 2d 914 (Cortland Co. Ct. 1973), rev'd on other grounds, 46 A.D. 2d 81 (3rd Dept. 1974). And in a recent case judicial notice was taken that Attica is not a rehabilitative institution and this determination was confirmed after an evidentiary hearing. Irving v. Preiser 79 Misc. 2d 486 (Sup. Ct. Erie Co. 1974).

Thus, Mr. Hollis has served twelve and one half years of criminal punishment as a result of his guilty plea to a crime that carried a maximum sentence of only five years. Indeed, if Mr. Hollis had been convicted of the most serious charge in the indictment against him - attempted rape in the first degree - the maximum sentence he could have received would have been ten years. Penal Law of 1909, §§ 2010, 261(2). Since he has served twelve and one half years, Mr. Hollis did not receive any benefits from plea-bargaining. In sum, it appears that the issue in this case is reasonably straightforward and that under the authorities discussed in the previously submitted memoranda of law, the petitioner is entitled to relief.

Very truly yours,

James J. McDonough

By

Howard B. Comet
Appeals Bureau

HBC:mk

cc: Mark Rutzick, Esq.
State of New York
Department of Law
Two World Trade Center
New York, New York 10047

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February 22, 1977

James J. McDonough
Attorney in Charge

The Honorable Thomas C. Platt
Judge, United States District Court
Eastern District of New York
United States Court House
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Hollis v. Smith, 76-C-1083

Dear Judge Platt:

I write to request reconsideration of the Court's decision in the above-entitled action or, in the alternative, a certificate of probable cause pursuant to 28 U.S.C. §2253. The request for reconsideration involves only petitioner's claim regarding the standard of proof that was applied in the state courts. I believe that in deciding this case, the Court should have dealt with the holding in Specht v. Patterson, 386 U.S. 603, 509-10 (1967), that defendants in sex offender proceedings are "entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings"; and the holding in United States ex rel Gerchman v. Maroney, 355 F. 2d 302, 313 (3d Cir. 1966), that "the guarantee of a jury trial would apply . . . if the Fourteenth Amendment makes it applicable in state criminal cases"; and the due process analysis in Mullaney v. Wilbur, 421 U.S. 684 (1975). However, I assume that in these areas the petitioner's remedy, if any, lies with the Court of Appeals.

With respect to the standard of proof issue, I believe that error was committed in the Court's handling of this case. I will state my understanding of what happened and I have appended to this letter a verification of my statements.

After five months of being repeatedly told by your honor's law clerk, Mr. Sloane, that a decision in this case

was forthcoming, I learned to my dismay that your honor had been engaged in ex parte communications with the Attorney General's office in order to introduce into this case a factual issue that had not been contested by the parties. I refer, of course, to the Court's request for an affidavit from Judge Kelly. I learned about this only because I telephoned Mr. Sloane on January 13, 1977 to ask when I might expect a decision and he then informed me that this affidavit had already been obtained from Judge Kelly and was in the mail. I indicated to Mr. Sloane that I would, of course, want to make some response to the affidavit if the affidavit created a factual issue and I stated that I might send copies of the Appellate Division briefs in the petitioner's case to the Court. Mr. Sloane said that he thought it might be very helpful if I sent the Appellate Division briefs. It was not until I examined the Court file in this case on February 15, 1977, that I learned that the Court had earlier requested these briefs from the Attorney General's office. There is a letter in the Court file dated November 17, 1976, from Assistant Attorney General Rutzick to your honor and marked to the attention of your honor's other law clerk, Mr. Townsend. The letter states that Mr. Rutzick was sending the briefs to the Court at Mr. Townsend's request. I did not receive a copy of this letter, no one ever informed me that this request was made and Mr. Sloane did not inform me that the Court already had copies of the Appellate Division briefs when I spoke to him on January 13th. As I indicated when I sent copies of the same briefs to the Court along with my letter dated February 7, 1977, the Appellate Division briefs in the petitioner's case give a distorted and incomplete view of the State's position unless they are considered in connection with the briefs filed in the Howard McCraw case. I received copies of the affidavit of Mr. Rutzick and Judge Kelly on January 14, 1977.

Along with my letter dated February 7th I sent a memorandum of law and the McCraw and Hollis briefs. These papers were mailed in Mineola at approximately 5 P.M. on February 7th. However, because I sent these papers directly to your honor, rather than to the clerk's office, the papers are not stamped and I do not know when they were received. In fact, when I examined the Court file on February 15th I learned that no one from your honor's office had informed the clerk's office that these papers had been received; and while they were in the Court file, they had not been entered on the docket sheet. (This was also true of my letter dated January 5, 1977, regarding the Seventh Circuit decision in Morgan v. Sielaff). I would assume that the papers I sent were received by the Court on February 9th or, possibly, on February 8th. Your honor's opinion is dated February 9th

and was entered in the clerk's office on that date. I received the opinion on February 11th. I thought, for reasons that will be obvious in light of the discussion below, that my letter of February 7th had possibly been omitted from the papers mailed to your honor. Accordingly, I telephoned your honor's office on February 11th and learned from your honor's secretary that some papers had been received - she could not recall exactly which ones - and that your honor's opinion had been "slightly changed" as a result. I must conclude from this series of events that your honor had already made a decision in this case before I had responded to the affidavit that was the product of the Court's ex parte communication with the Attorney General's office. And after this case had been pending sub judice for six months, it would appear that your honor gave very limited consideration to the papers I sent.

Indeed, it appears that much of what I had to say was simply ignored by the Court. In my letter dated February 7th I requested that the Court rule, based on the arguments made in my memorandum of law, on whether the Kelly affidavit would be considered. And I continued,

If it [the Kelly affidavit] is to be considered, then petitioner requests that an evidentiary hearing be held on the subject of the standard of proof that was applied at petitioner's resentencing hearing. A hearing would be required because substantial, disputed issues of fact in a habeas corpus proceeding may not be established by ex parte affidavits alone. Walker v. Johnston, 312 U.S. 275, 287 (1941); Wright v. Dickson, 336 F. 2d 878, 882-83 (9th Cir. 1964); Jones v. Cunningham, 313 F. 2d 347, 349 n. 4 (4th Cir.), cert. denied, 375 U.S. 832 (1963); United States v. Salerno, 290 F. 2d 105, 106 (2d Cir. 1961).

Given these statements in my letter, I think it is perfectly understandable that I did not submit any new evidence in contradiction to Judge Kelly's affidavit. However, the Court did not make the requested ruling or hold an evidentiary hearing. Nor was the petitioner offered any other method for factually contesting Judge Kelly's claim. See, 28 U.S.C. §2246. Instead, the following statement appears in the Court's opinion: "While petitioner's attorney vigorously questions this sworn statement of Mr. Justice Kelly in an unsigned and unverified memorandum filed in opposition thereto, he has not served or filed any affidavit or other evidence which directly or indirectly refutes the same."

This sentence in the Court's opinion is incomprehensible to me in light of the actual nature of the papers I submitted. The suggestion is that I am accusing Judge Kelly of lying under oath even though I have not submitted anything to substantiate this claim. First of all, I submitted a memorandum of law,

not of fact. I know of no rule of procedure or evidence in any jurisdiction that requires that a memorandum of law be verified. This memorandum was basically not intended to question the factual accuracy of Judge Kelly's affidavit. Instead, I offered legal reasons why the court should not consider the affidavit regardless of its accuracy. To the extent that I did question the factual accuracy of the affidavit, this was entirely based on Judge Kelly's own statements in material that was in evidence in this case (28 U.S.C. §2247), namely, the transcript of the petitioner's resentencing hearing and Judge Kelly's opinion of February 20, 1969. (See pp. 10-12 of the Memorandum). I also argued, and assert again, that Judge Kelly's affidavit is not competent evidence because it does not appear to be based on memory, or a refreshed recollection, or even past recollection recorded. Judge Kelly has offered a legal opinion based on his experience as a criminal lawyer and a judge presiding over criminal cases. And, as a legal opinion, the affidavit is not credible because it directly conflicts with the real state of the law in New York.

Second, I did not submit any further evidence along with the memorandum of law because I requested in my letter that the Court first rule on whether Judge Kelly's affidavit would be considered. However, the Court did already have the verified position for a writ of habeas corpus in which it is stated that the petitioner was "denied the right . . . to have the facts underlying the sex offender determination proven beyond a reasonable doubt." And the Court had the transcript and the 1969 opinion which cast substantial doubt on the accuracy of Judge Kelly's affidavit.

I now renew my request that the Court rule on whether the Kelly affidavit will be considered in light of the arguments made in the memorandum of law. And if it is to be considered, I again request that an evidentiary hearing be held.

I also think it appropriate to suggest that the Court's holding at page 7 that petitioner has not exhausted state remedies in connection with the standard of proof claim is erroneous. Petitioner presented his claim regarding the standard of proof to the Appellate Division and leave to appeal was denied by the New York Court of Appeals. I know of no New York procedure by which petitioner may now argue that the Appellate Division was incorrect in holding that this claim was "without merit." I also see no connection between this point and lines 7-10 of 83 Harv. L. Rev. 1038, 1096. The one full sentence in those lines deals with the presentation of new evidence to the state courts rather

than the federal courts. Even if Judge Kelly's affidavit is new evidence, I cannot see how it can be used in the state courts in support of a claim that the petitioner's rights were denied. There is, therefore, "an absence of available State corrective process," 28 U.S.C. §2254(b), and the exhaustion requirement is inapplicable. United States ex rel Durocher v. LaValle, 330 F. 2d 303, 306 (2d Cir.) (en banc), cert. denied, 377 U.S. 998 (1964).

Moreover, the law is clear that there is no requirement that petitioner utilize state collateral remedies if his claim has been presented to the state appellate courts. Brown v. Allen, 344 U.S. 443, 448-48 n.3 (1953); Brathwaite v. Manson, 527 F. 2d 363, 366 (2d Cir. 1975). And it is also clear that state remedies are exhausted where a claim is presented for the first time at the state appellate level. Warden v. Hayden, 387 U.S. 294, 297 n.3 (1967); United States ex re? Leeson v. Damon, 496 F. 2d 718, 720-21 (2d Cir. 1974); United States ex rel. Vanderhorst v. LaValle, 417 F. 2d 411, 412-13 (2d Cir. 1969) (en banc). Thus, state remedies have been exhausted.

Finally, unless there are further papers in this case that I have not been informed about, respondent has not raised any issue of the petitioner's failure to exhaust state remedies. Since the exhaustion requirement is a rule of comity rather than jurisdiction, it would appear to be improper for the Court to rely on the requirement in the absence of any claim by respondent. Fay v. Noia, 372 U.S. 391, 434-35 (1963); Brathwaite v. Manson, 527 F. 2d 363, 366 (2d Cir. 1975); United States ex rel Curtis v. Warden, 463 F. 2d 84, 86 (2d Cir. 1972); United States ex rel. Cuomo v. Fay, 257 F. 2d 438, 441 (2d Cir. 1958). Certainly it seems improper for the Court to sua sponte hold that the petitioner has not exhausted state remedies without giving the petitioner any opportunity to say anything about the matter.

Thus, even assuming arguendo that Judge Kelly applied the beyond a reasonable doubt standard, the petitioner was denied the right to have this standard applied by the Appellate Division, which has the power to review the sufficiency of evidence under CPL §470.15(2)(a) and (b). Accordingly, it is requested that the Court rule on whether this action by the Appellate Division denied petitioner's constitutional rights.

In sum, for all of the above stated reasons, it is respectfully requested that the Court reconsider its decision in this case or, in the alternative, grant the petitioner a certificate of probable cause pursuant to 28 U.S.C. §2253.

Very truly yours,

John J. [illegible]

By:

A-212

Page 3
February 22, 1977

Very truly yours,

James J. McDonough

By

Howard B. Comet
Howard B. Comet
Appeals Bureau

HBC/mk

cc: Mark Rutzick, Esq.
State of New York
Department of Law
Two World Trade Center
New York, New York 10047

VERIFICATION

STATE OF NEW YORK)

COUNTY OF NASSAU)

HOWARD B. COMET, being duly sworn, deposes and says:

That he is the attorney for the petitioner in the within action; that he has read the foregoing letter and knows the contents thereof; that the same is true to deponent's own knowledge, except as to matters therein stated to be alleged on information and belief and, as to those matters, deponent believes them to be true.

Howard B. Comet
HOWARD B. COMET

Sworn to before me this
22nd day of February, 1977.

Harry D. Hersh

HARRY D. HERSH
NOTARY PUBLIC, State of New York
No. 30-4819635

Qualified in Nassau County
Commission Expires March 30, 1977

EXCERPT FROM PETITIONER'S MEMORANDUM OF LAW

sentence. No challenge to that conviction or sentence is raised herein, but, as discussed in Point IV, infra, the 1 1/2 to 3 year sentence is relevant to the question of jurisdiction. He will be entitled to conditional release on the 1 1/2 to 3 year sentence on August 3, 1976.

Petitioner appealed his resentence to the Appellate Division, Second Department. Petitioner argued that the psychiatric report introduced at his resentencing was insufficient as a matter of law because it did not discuss whether petitioner had a sex problem. The petitioner also argued that he was denied due process at the resentencing hearing because he was denied the right to a jury trial, the right to have the facts underlying the sex offender determination proven beyond a reasonable doubt, the right to remain silent and the right to the assistance of counsel at all stages of the proceedings against him. These latter claims are advanced by petitioner in the instant petition.

The Appellate Division rejected all of petitioner's contentions and affirmed in a memorandum opinion. People v. Hollis, 34 A.D.2d 786 (1970). Leave to appeal to the Court of Appeals was denied by Judge Breitel.

Petitioner is presently incarcerated in the Attica Correctional Facility. It is alleged that he is confined there under the same conditions as all other inmates and receives no special psychiatric or rehabilitative treatment. The decision to keep him in prison is made by the Parole Board after hearings that are equivalent to the parole release

as in most criminal cases, were kept within a maximum range. However, in Stachulak, as in the instant case, the sex offender is given a wholly indeterminate sentence, a sentence of life imprisonment. Id. at 936. And the Court went on to state that

.. Likewise with respect to stigma an involuntary commitment for sexual dangerousness presents an a fortiori case: Unlike the delinquency proceedings in Winship, these actions are not confidential, and an adjudication of sexual dangerousness is certainly more damning than a finding of juvenile delinquency.

Id. The same is, of course, true with respect to the instant case.

In Stachulak, Illinois attempted to defend the use of the preponderance standard, rather than the reasonable doubt standard, in two ways; first, it was claimed that the lesser standard was appropriate because the purpose of the commitment was to provide treatment for the sexual deviant. This claim was rejected:

But this assertion is archaic. All too often the "promise of treatment has served only to bring an illusion of benevolence to what is essentially a warehousing operation for social misfits." Cross v. Harris, 135 U.S. App. D.C. 259, 418 F.2d 1095, 1107 (1969). It is well settled that realities, rather than benign motives or non-criminal labels, determine the relevance of constitutional policies. [Citations].

Id. Here, petitioner, an inmate at Attica, alleges that he is confined in prison under exactly the same conditions

as all other felony prisoners and that he receives the same treatment or, more precisely, the same lack of treatment as all other prisoners (see Point II, i ra). Thus, the use of a standard of proof less than beyond a reasonable doubt can not be justified in this case on the ground that petitioner's confinement is for the purpose of treatment.

The second defense of the lesser standard in Stachulak was that the reasonable doubt standard is unworkable because, it was claimed, it is impossible to prove beyond a reasonable doubt "that a person is suffering from a mental disorder with a propensity to commit criminal sexual assaults." 520 F.2d at 936. This is due to "the uncertainties inherent in the present state of psychiatric diagnosis and prediction." Id. The Court responded that

We are not unaware of the limitation of psychiatric diagnosis. Proof of mental state, however, is a commonplace in the law, and despite the difficulty of establishing many controverted facts in a criminal trial, we steadfastly adhere to the reasonable-doubt burden of proof. Mullaney v. Wilbur, 421 U.S. 684, 699-704 (1975). If the disparate opinion of psychiatrists and the vagaries of proof and prediction suggest anything, it is the desirability of the utmost care in reaching the commitment decision

....
Burdens of proof serve to allocate the risk of an erroneous decision between the parties in a lawsuit, and the reasonable-doubt standard reflects society's judgment "that it is far worse to convict an innocent man than to let a guilty man go free." In re Winship, supra, 397 U.S. at 372, 90 S.Ct. at 1077 (Harlan, J., concurring). We recognize that society has a substantial interest in the protection

EXCERPT FROM PETITIONER'S REPLY MEMORANDUM

be determined, applying the proper standard of proof, by a jury, not the judge.* In short, Mullaney establishes the principle that any factual element of a criminal charge that determines the permissible sentence must be adjudicated with all the due process safeguards that are required in criminal proceedings. This principle was not followed in the instant case.

Petitioner's argument would not necessarily be absolutely compelling, however, were it not for the second key factor in this case: the petitioner is confined in a maximum security penal institution where he is serving a life sentence.** He is incarcerated there under the same conditions as all other inmates. No

*It was held that there is a right to a jury trial in sex offender proceedings in People v. Feagley, 14 Cal.3d 338, 121 Cal. Rptr. 509, 535 P.2d 373, 378-86 (1975), and in Gerchman v. Maroney, supra 355 F.2d at 313, the Court stated that "the guarantee of a jury trial would apply to [the Pennsylvania sex offender proceeding] if the Fourteenth Amendment makes it applicable in state criminal cases." Subsequently, it was held that state criminal defendants have the right to a jury trial in Duncan v. Louisiana, 391 U.S. 145 (1968).

**While it probably is not in any way determinative of the issues in this case, it is worth noting that the particular maximum security penal institution that the petitioner is confined in - Attica - has been marked in recent years by riots, killings, overcrowding and little regard for rehabilitation. To get some sense of the present situation in Attica, one need look no further than the statement of Scott Christianson, the director of the State Prison Unit of the New York Correction Commission, a state agency: "What we have is a combat situation. The environment is so physical, so potentially dangerous, the power of both the inmates and the guards is so awesome, that it can go off at any time. Both sides have the power of death in their hands." Quoted in, Ferretti, Attica is Termed as Bad as Before 1971 Rebellion, N.Y. Times, July 21, 1976, p. 1, col. 3. While there is undoubtedly some hyperbole in this statement, it cannot be claimed that Attica is in any sense a therapeutic institution. Yet, respondent's memorandum incredibly characterizes the petitioner's incarceration in Attica as being "akin to a civil judgment." (p. 9).